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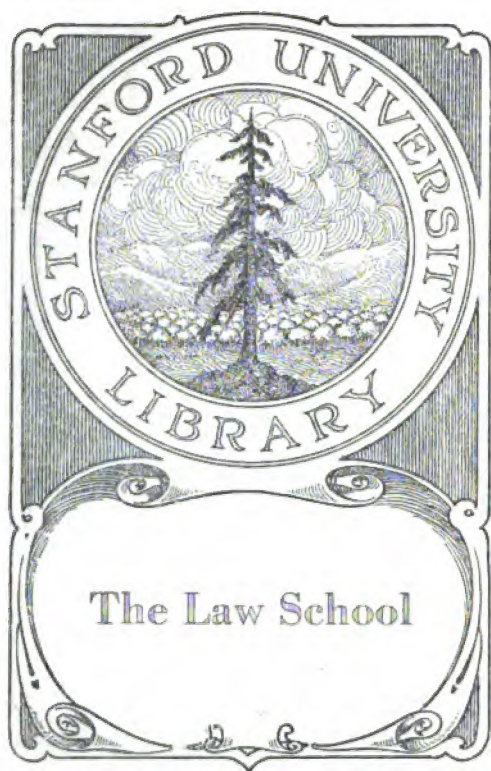
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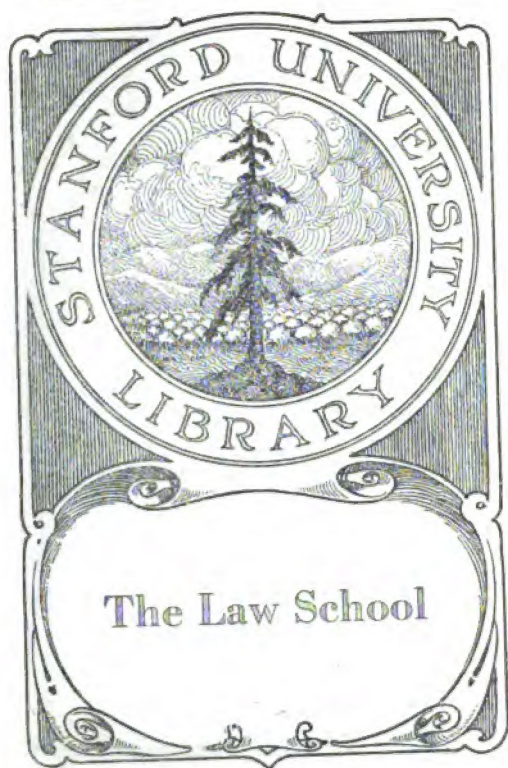
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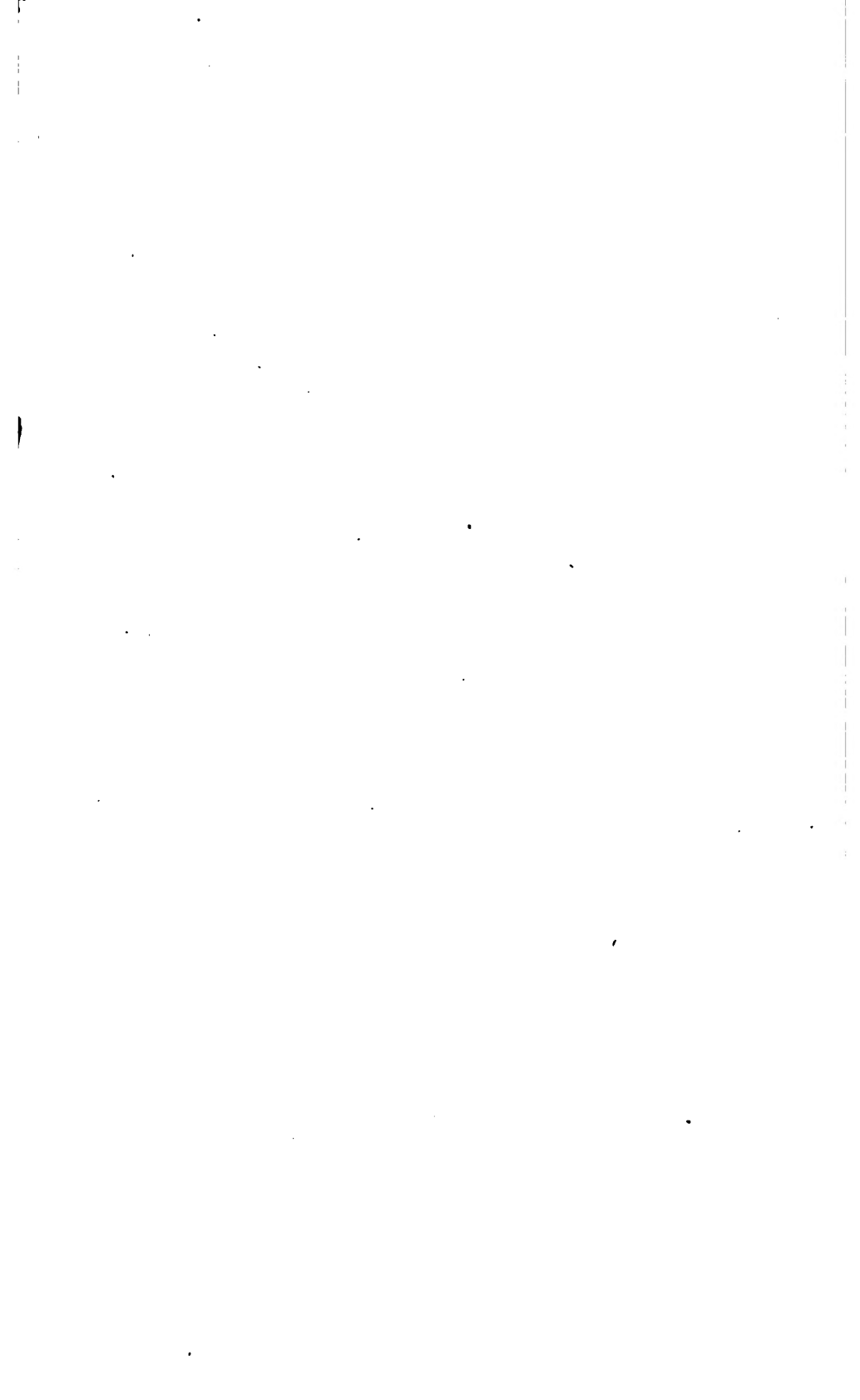


















# R E P O R T S

OF

## CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law,

WITH

TABLES OF THE CASES, AND PRINCIPAL MATTERS.

*Gillaspie*

HERETOFORE CONDENSED BY

THOMAS SERGEANT, AND JOHN C. LOWBER, ESQRS.

Now Reprinted in full.

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### VOLUME XV.

CONTAINING THE CASES DECIDED IN THE COURT OF KING'S BENCH, IN EASTER,  
TRINITY, AND MICHAELMAS TERMS, 1828, AND IN THE COMMON  
PLEAS, FROM TRINITY TERM, 1828, TO EASTER TERM,  
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# R E P O R T S

OF

## CASES

ARGUED AND DETERMINED

IN

# THE COURT OF KING'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES, AND  
THE PRINCIPAL MATTERS.

---

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,

AND

CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQRS.

BARRISTERS AT LAW.

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## VOLUME VIII.

CONTAINING THE CASES OF EASTER, TRINITY, AND MICHAELMAS TERMS  
IN THE 9TH YEAR OF GEORGE IV. 1828.

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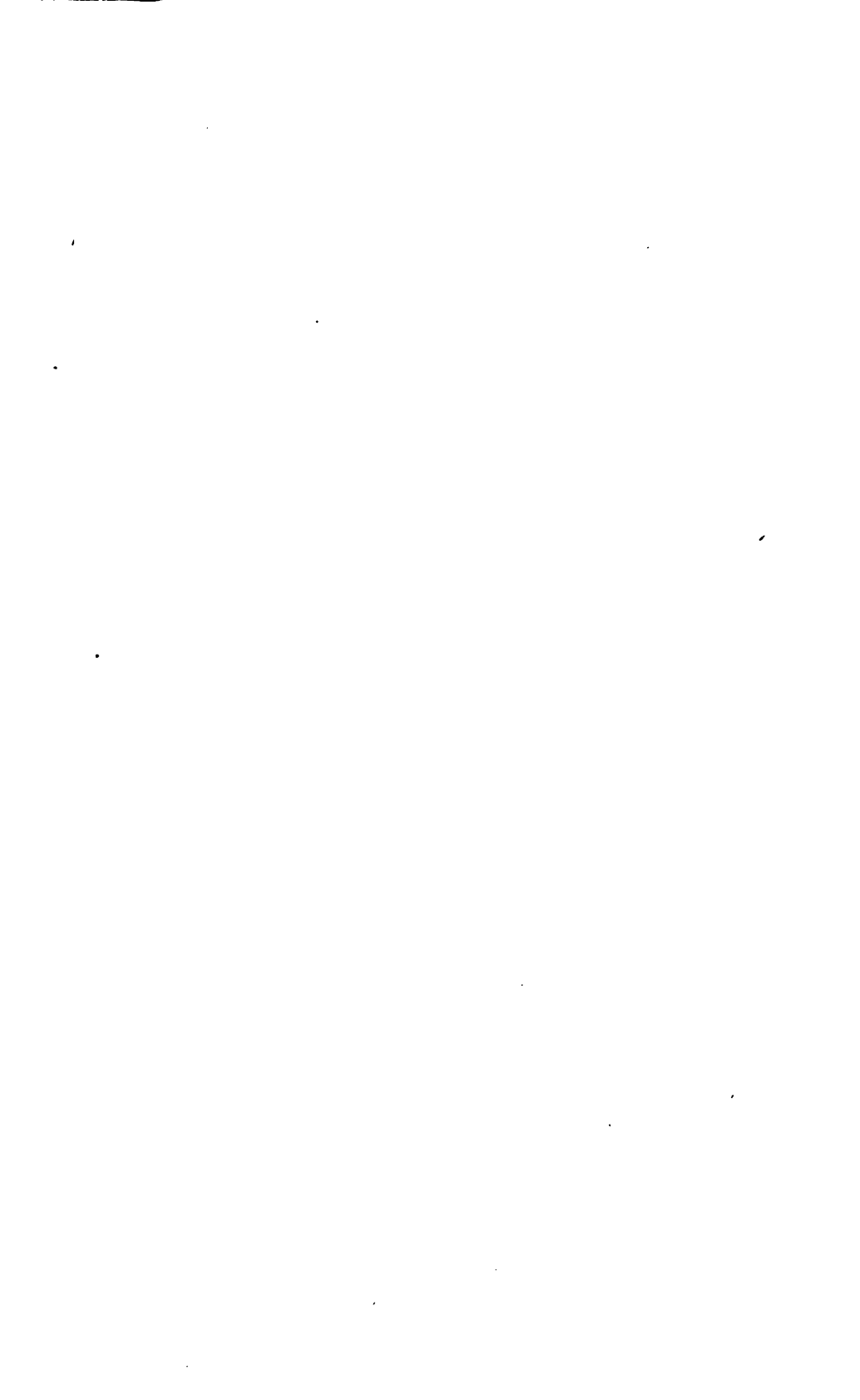
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**JUDGES**  
**OF**  
**THE COURT OF KING'S BENCH,**  
**DURING THE PERIOD OF THESE REPORTS.**

---

**CHARLES LORD TENTERDEN, C. J.**  
**Sir JOHN BAYLEY, Knt.**  
**Sir GEORGE SOWLEY HOLROYD, Knt.**  
**Sir JOSEPH LITTLEDALE, Knt.**  
**Sir JAMES PARKE, Knt.**

---

**ATTORNEYS-GENERAL.**  
**Sir JAMES SCARLETT, Knt.**  
**Sir CHARLES WETHERALL, Knt.**

---

**SOLICITOR-GENERAL.**  
**Sir NICHOLAS C. TINDAL, Knt.**

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C A S E S  
 ARGUED AND DETERMINED  
 IN THE  
 COURT OF KING'S BENCH,  
 IN  
 E A S T E R T E R M ,

In the Ninth Year of the Reign of GEORGE IV. — 1828.

===== *Galluspie*  
 SPARKES and Others v. BELL and Wife. — p. i.

A married woman, taken in execution together with her husband for a debt due from her before marriage, is not entitled to be discharged, unless it appears that she has no separate property, even although the husband has been discharged under the insolvent act.

A RULE nisi had been obtained to discharge an order made by *Bayley, J.*, for discharging Sarah Bell out of custody, she having been taken in execution, together with her husband, on a *ca. sa.* issued against them, and for issuing a new writ of *ca. sa.* against her. By the affidavits it appeared that Sarah Bell, before her intermarriage with the other defendant, carried on the business of a baker at Exeter, and became indebted to the plaintiffs in the sum of 100*l.* and upwards. In February, 1827, she married the other defendant, having previously conveyed a house and other premises, in which she had an estate for her own life, her furniture and stock in trade, to a trustee for her separate use. Soon after the marriage the plaintiffs commenced an action against the two defendants for the recovery of the 100*l.* due, and arrested them both, whereupon they gave bail. The husband was soon afterwards arrested for another debt, and committed to prison, and he and his wife suffered judgment by default in the action brought by the plaintiffs, and afterwards a *ca. sa.* was issued, upon which the husband, then in custody, was charged in execution, and Sarah Bell was committed to the same prison. An order for her discharge was made by *Bayley, J.*, and the husband afterwards obtained his discharge as an insolvent debtor.

The affidavits in answer did not deny the allegations made by the plaintiffs, but showed that the house was mortgaged, not, however, to the full value.

*Archbold* showed cause, and contended that the application to discharge the order was too late, the husband having in the mean time obtained his discharge as an insolvent debtor. In the case of *Miles v. Williams et Ux.*, 1 P. Wms. 249, it was held that a debt contracted by the wife *dum sola* was discharged by the bankruptcy of the husband: this case is precisely analogous; the debt was discharged by the provisions

of the insolvent act, and the wife cannot now be retaken in execution for it. She cannot obtain her discharge under the insolvent act, *Ex parte Deacon*, 5 B. & A. 759.

*Merewether*, Serj., and *F. Kelly*, contra, were stopped by the Court.

BAYLEY, J. I do not recollect upon what ground the order for discharging Sarah Bell was made, but I am satisfied by the affidavits now before the Court that the order was properly made. The debt in question was originally the debt of the wife; by the marriage it became the debt of the husband and wife; and where judgment is obtained in an action for such a debt, the rule as to the execution is correctly laid down in *Tidd's Practice*, 1026, 9th ed. "In an action against husband and wife, they may both be taken in execution; and when the wife is taken in execution, she shall not be discharged unless it appear that she has no separate property out of which the demand can be satisfied, or that there is fraud and collusion between the plaintiff and her husband to keep her in prison." There is no pretence for imputing any collusion in this case, and it does appear that the wife has separate property: she has a house, the clear rent of which exceeds by 8*l.* a year the interest of the mortgage upon it. I am, therefore, of opinion that a new writ of *ca. sa.* must be issued.

HOLROYD and LITLEDALE, Js., concurred.

Rule absolute. (a)

(a) See 3 Wils. 124.

#### WILDBOR v. RAINFORTH and Another. — p. 4.

Where a pauper, who had been permitted to occupy a parish house, went away from home: Held, that the overseers might lawfully enter and resume possession, without giving any notice to quit, and were not bound to pursue the mode pointed out by the 59 Geo. 3, c. 12, s. 24.

TRESPASS for breaking and entering the plaintiff's house, making a disturbance there, and carrying away her goods and chattels; second count, for ejecting the plaintiff from her house; third, for taking her goods and chattels. Pleas, the general issue and several special pleas, alleging in substance that the goods and chattels in the declaration mentioned were the property of certain persons named in the pleas; that they were delivered to the plaintiff to be taken care of and re-delivered on request; that the plaintiff took such bad care of them that they were in danger of being lost or stolen, wherefore the defendants by the command of the owners entered the house, the outer door being open, and took them away. There were other pleas, alleging that the plaintiff refused to re-deliver the goods on request, wherefore the defendants took them. To some of these pleas the plaintiff replied *de injuriâ*, and traversed the property in the goods as laid in the others, but the issues taken on them did not eventually appear to be material. At the trial before *Alexander*, C. B., at the last Spring assizes for Lincolnshire, it appeared that the house in question had for some time been rented of one Dennis by the overseers of the poor of the parish. The plaintiff was the widow of a pauper who died in October 1826, and for some time before had received parish relief, and was suffered by the overseers to occupy the house in question. After his death the plaintiff continued to reside in it with three children of her husband by a former marriage, and for whose support she received an allowance from the parish, until the 4th of July 1827, when she went from home, leaving the three children there. On the

6th the defendants, being overseers of the poor, entered and took possession of the premises, and put locks upon the doors, and took away the children to the workhouse. About ten days afterwards the plaintiff returned, broke open the locks, and resumed possession of the house, and on the 23d of July the defendant Rainforth came to the house, and finding the door locked, required the plaintiff to open it, which she refused to do, whereupon he broke open the door and carried away the furniture, which belonged to the parish. The Lord Chief Baron told the jury that if they thought it was a parish house, and the furniture parish property, they had a right to enter and resume possession in the manner proved. The jury found a verdict for the defendants.

*Denman* now moved for a new trial, and contended, that, admitting the property in question to be vested in the overseers of the poor, still they had no right to take possession of the house on the 6th of July, but should have pursued the course pointed out by the 59 G. 3, c. 12, s. 24.(a) [*Bayley, J.* The plaintiff was merely an occupier by sufferance.] The statute, by implication, gave her a right to keep possession until the expiration of the notice.

*LORD TENTERDEN, C. J.* The plaintiff was not tenant of the premises, but was allowed to occupy them by the parish officers. Her occupation was in fact theirs. The statute was not intended to take away a right which the owner of property had at common law to enter and take possession, if it could be done peaceably, but to provide an expeditious mode, whereby parish officers might obtain possession where it was obstinately withheld, and that they might not do that which had before been sometimes done, viz. might not turn occupiers out *vi et armis*, which led to further expense and litigation. Here the plaintiff had gone away, the defendants entered, resumed possession, and afterwards carried away the furniture which belonged to them. All that they might lawfully do; there is not, therefore, any ground for objecting to the verdict.

*BAYLEY, J.* The provisions of the statute are equally applicable whether the party has wrongfully intruded himself into the premises or has been suffered by the parish officers to occupy them. Now it never could have been intended in the former case that the officers should not be at liberty to resume possession, if that could be done without a breach of the peace; I am, therefore, of opinion that the statute does not apply to the present case, and

(a) By which, after reciting "that difficulties have frequently arisen, and considerable expenses have sometimes been incurred by reason of the refusal of persons, who have been permitted to occupy, or who have intruded themselves into parish or town houses, or other tenements or dwellings, built or provided for the habitation of the poor, or otherwise belonging to such parishes, to deliver up the possession of such houses, tenements, or dwellings when thereto required," it was enacted, "that if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to, or provided by or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, &c., shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish within one month after notice and demand in writing for that purpose, signed by such churchwardens, &c., shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, it shall be lawful for any two of his Majesty's justices of the peace, upon complaint to them made by one or more of the churchwardens and overseers, &c., to issue their summons to the person against whom such complaint shall be made, &c.; and such justices are hereby empowered and required, upon the appearance of the defendant or upon proof on oath that such summons hath been delivered, &c. as hereby directed, to proceed to hear and determine the matter of such complaint; and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

that the defendants, having the soil and freehold of the house in question, had a right to enter and take possession when the plaintiff went from home.  
Rule refused.

### KEATES v. WHIELDON.—p. 7.

A promissory note for 11*l.*, payable to A. B. on demand, is a promissory note payable to bearer on demand, within the meaning of the 55 Geo. 3, c. 184, and requires a stamp of two shillings.

ASSUMPSIT on a promissory note. Plea, general issue. At the trial before Park, J., at the Spring assizes for the county of Stafford, 1828, the note was produced, and appeared to be in the following form: "I J. Whieldon of F. do promise to pay to J. Keates the sum of eleven pounds ten shillings on demand, with lawful interest for the same," and it had affixed on it a stamp of one shilling and sixpence only. It was objected by the defendant's counsel that this was a note payable to the bearer on demand of a sum of money exceeding 10*l.*, but not exceeding 20*l.*, within the first class of promissory notes mentioned in the 55 G. 3, c. 184, sched. part 1, and, therefore, that it required a stamp of two shillings. On the other hand, it was insisted that the first division of that part of the schedule applied in terms only to such promissory notes as were capable of being re-issued by bankers, and that by the fourteenth and twenty-fourth sections, those must be notes payable to the bearer on demand; that this was a note payable to the *payee only*, and not to the bearer, and therefore that it did not come within that part of the schedule; and if so, it must be within the next class of promissory notes mentioned in the schedule, viz. promissory notes for the payment in any other manner than to the bearer on demand, but not exceeding two months *after date*, or *sixty days after sight*, of any sum of money exceeding 5*l.* 5*s.*, and not exceeding 20*l.*, and therefore that the stamp of one shilling and sixpence affixed on this note was proper. The learned Judge was of opinion that it required a two-shilling stamp, and directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a nonsuit.

W. E. Taunton now moved, and re-urged the arguments used at the trial.

LORD TENTERDEN, C. J. It seems to me that the note in question does fall within the first part of that division of the schedule applicable to promissory notes payable to the bearer on demand, and that it does not fall within the second, which applies only to notes not exceeding two months after date, or sixty days after sight.

BAYLEY, J. We cannot say that this was not a note which might be re-issued, for by the stamp act other persons than bankers may take out a license to re-issue notes.  
Rule refused.

### RICHMOND v. SMITH.—p. 9.

Where a traveller went to an inn, and desired to have his luggage taken into the commercial room, to which he resorted, from whence it was stolen: Held, that the innkeeper was responsible, although he proved that according to the usual practice of his house, the luggage would have been deposited in the guest's bed-room, and not in the commercial room, if no order had been given respecting it.

CASE on the custom of the realm against the defendant, an innkeeper, for the loss of certain goods, which the plaintiff, a guest, had carried with him to the defendant's inn. Plea, the general issue. At the trial, before Alexander, C. B., at the last Spring assizes for Nottingham, it appeared that the plaintiff went by a stage-coach from London to the

defendant's inn at Nottingham, having with him several packages. Some of them were taken up stairs to his bed-room, but one package, at his desire, was carried into the commercial room, into which he was shown. It was the usual practice at that inn to take all the luggage of the guests into their bed-rooms, unless orders to the contrary were given. The package taken into the commercial room contained silks of various kinds, and on the day after the plaintiff's arrival at Nottingham he took it out, to exhibit his goods to different customers; some were sold, and the package was taken back to the commercial room, from which it was afterwards stolen. For the defendant it was contended that the plaintiff, by ordering the goods to be taken into the commercial room, took them under his own protection, and therefore could not make the innkeeper responsible for the loss. The Lord Chief Baron told the jury that the defendant was in the situation of a carrier, and could not get rid of his common-law liability unless by giving an express notice; and under that direction they found a verdict for the plaintiff.

Clarke now moved for a new trial, and contended that the Lord Chief Baron misdirected the jury in stating that the defendant could only get rid of his liability by express notice. In *Burgess v. Clements*, 4 M. & S. 306, it was held that a guest who desired to have a private room, in which he placed his goods, out of which they were stolen, had exonerated the innkeeper. Here the goods, but for the plaintiff's order, would have been taken to his bed-room, where, in all probability, they would have been safe. But he chose to have them in the public room; it is, therefore, but reasonable that he, and not the landlord, should suffer by the loss that ensued.

LORD TENTHREN, C. J. I am of opinion that we ought not to grant a rule on the ground of the supposed misdirection in this case. It appears that the plaintiff went to the defendant's inn as a guest, taking certain goods with him. It was the habit of the servants of that inn to place the goods of their customers in their bed-rooms; but the plaintiff chose to have the package in question carried into the room to which travellers in general resorted. It is clear that, at common law, when a traveller brings goods to an inn, the landlord is responsible for them. And if it had been intended by the defendant not to be responsible unless his guests chose to have their goods placed in their bed-rooms, or some other place selected by him, he should have said so. In this respect I think that the situation of the landlord was precisely analogous to that of a carrier, and that the direction given to the jury was right.

BATLEY, J. It appears to me that an innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies; although he may be exonerated where the guest chooses to have his goods under his own care.

HOLNOR, J. In the case of *Burgess v. Clements* the plaintiff asked to have a room, which he used for the purposes of trade, and not merely as a guest in the inn. That was very different from the present case.

Rule refused. (a)

(a) See 1 Roll. Abr. Action sur Case, F. pl. 5.



PENNY and Another, Assignees of R. BUNCOMBE, a Bankrupt,  
v. FOY. — p. 11.

Where a defendant pleaded, by way of set-off, a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear: Held, that he was not bound to prove that he had paid the money in order to set it off, but that on production of the bond the plaintiff was bound to prove payment.

DEBT on bond, dated the 7th of June, 1817, for 658*l.*, given by the defendant to the bankrupt before his bankruptcy. Pleas, (after craving oyer of the condition of the bond, whereby it appeared to be for the payment of 329*l.* and interest on the 7th of June, 1822,) first, non est factum. Secondly, that R. Buncombe did not become bankrupt, as alleged in the declaration. Thirdly, that before R. Buncombe became bankrupt, he executed an assignment of all his property, bonds, bills, &c., to certain persons upon certain trusts, and that the trustees accepted the assignment, whereby the bond in the declaration mentioned, and all R. Buncombe's beneficial interest therein, became vested in the trustees. Fourthly, that at the time of the commencement of the suit, there was due to the plaintiffs upon the bond in the declaration mentioned 455*l.* for principal and interest, and that before the said R. Buncombe became bankrupt, to wit, on the 7th of June, 1817, he, by his writing obligatory, became bound to the defendant in the penal sum of 300*l.*, subject to a condition, whereby (after reciting that certain premises of the defendant were charged with the payment of an annuity of 50*l.* to Elizabeth Buncombe, and which the defendant also engaged to pay, and that R. Buncombe, in consideration of 149*l.* to him paid by the defendant, had agreed to pay and discharge the said annuity to E. Buncombe, and to indemnify the defendant of and from the same,) it was declared that if R. Buncombe did well and truly pay the said annuity, and indemnify defendant from the same, then the bond should be void, otherwise, &c. Averment, that after making the said last-mentioned bond, to wit, on, &c., a large sum of money, to wit, 200*l.*, for and on account of the said annuity, became and was due and in arrear to the said E. Buncombe, and that at the time of exhibiting the bill of the plaintiffs they were and still are indebted to the defendant in the sum of 200*l.*, being the amount of the said arrears. And further, that plaintiffs at that time were and still are indebted to the defendant in the further sum of 300*l.* for money lent, &c. To the third plea plaintiffs replied, that the bond did not pass to the trustees. To the fourth, that they the plaintiffs were not indebted as alleged. At the trial, before *Gaselee, J.*, at the last Spring assizes for Somerset, the jury found a verdict for the plaintiff on the first three pleas. In support of the fourth, the defendant produced the bond set out in the plea, but did not give any evidence that he had been obliged to pay the annuity to E. Buncombe. For the plaintiffs it was contended that the defendant could only set off what he had paid, and, therefore, in the absence of proof of any payments, the issue on that plea must be found for the plaintiffs. The learned judge thought that the plaintiffs were bound to prove payment according to the condition of the bond, and directed a sum of 200*l.* for the arrears mentioned in the plea to be deducted from the amount of the

verdict on the other issues, but gave the plaintiff leave to move to enter a verdict in his favor on that issue also.

*Wilde*, Serjt., now moved accordingly, and contended, as before, that the defendant could not be entitled to set off any more than he had actually paid.

Lord TENTERDEN, C. J. This question, arising on a plea of set-off, must be treated as if it had arisen in an action on the bond. Now, that was conditioned for payment of the annuity as well as for indemnifying the defendant; and had an action been brought on this bond, the obligor would, as in the ordinary case of actions on bonds, have been bound to prove payment.

BAYLEY, J. If the bond had been a bond of indemnity only, the defendant must have proved actual damage. But as the condition was for payment of the annuity, the onus of proving payment was upon the plaintiff. *Toussaint v. Martinnant and Another*, 2 T. R. 100, is an express authority, that where a bond is given to a surety, conditioned for payment of the money, the surety may sue upon it as soon as the condition is broken, although he has not been called upon to pay.

Rule refused.

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MAUGHAM v. HUBBARD and ROBINSON, Assignees of LANÇAS-  
TER, a Bankrupt. — p. 14.

A witness called to prove the receipt of a sum of money, was shown an acknowledgment of the receipt of such money signed by himself; and on seeing it, said that he had no doubt he had received it, although he had no recollection of the fact: Held, that this was sufficient parol evidence of the payment of the money, and that the written acknowledgment having been used to refresh the memory of the witness, and not as evidence of the payment, did not require any stamp.

ASSUMPSIT for money had and received. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last term, it appeared that the action was brought to recover from the assignees of the bankrupt 20*l.* paid by the plaintiff to the bankrupt before his bankruptcy. The bankrupt being called as a witness on the part of the plaintiff stated, that he had dealt with the plaintiff several years; that in November 1822, 20*l.* was received from the plaintiff, which was not carried to the account. A rough cash-book kept by the plaintiff was then put into his hands; in which there was the following entry: "4th of November 1822. Dr.—R. Lancaster. Check 20*l.* R. L." The bankrupt then said, "The entry of 20*l.* in the plaintiff's book has my initials, written at the time; I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money." It was contended that the paper on which this entry was made ought to have been stamped as a receipt; but Lord Tenterden, C. J., was of opinion, that though it was not itself admissible in evidence to prove the payment of the money the witness might use it to refresh his memory; and that his having said that he had no doubt that he received the money was sufficient evidence of the fact. A verdict was found for the plaintiff, but liberty was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that this evidence ought not to have been received.

*Robinson* now moved accordingly, and contended, that as the entry in the plaintiff's own book could be used for no other purpose than that of proving the receipt of the money by the bankrupt, it ought to have been

stamped. Here the witness stated that he had no recollection of the fact of the receipt of the money. The effect of allowing the witness to look at the entry to refresh his memory was to make it operate as a receipt, and it ought, therefore, to have been stamped. He cited *Hawkins v. Warre*, 3 B. & C. 690.

Lord TENTERDEN, C. J. In order to make the paper itself evidence of the receipt of the money it ought to have been stamped. The consequence of its not having been stamped might be, that the party who paid the money, in the event of the death of the person who received it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory; and when he said that he had no doubt he had received the money there was *sufficient* parol evidence to prove the payment.

BAYLEY, J. Where a witness called to prove the execution of a deed sees his signature to the attestation, and says that he is, therefore, sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, though the witness add that he has no recollection of the fact of the execution of the deed.

Rule refused.

### HENLEY v. SOPER the Elder.—p. 16.

Debt lies on the decree of a colonial court made for payment of the balance due on a partnership account. One of the partners gave his son a power of attorney, "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit:" Held, that this gave the son power to submit the accounts to arbitration.

DEBT on a judgment of the supreme court of judicature in Newfoundland, whereby the plaintiff recovered a debt of 608*l.* 2*d.* with costs of suit, which were taxed at 56*l.* 9*s.* 11*d.* Count for interest. Plea, nil debet. At the trial before *Gaselee, J.*, at the last Spring assizes for Devonshire, the proceedings of the supreme court were given in evidence, whereby it appeared that on the 4th of June, 1825, the present plaintiff presented a petition to that court, stating that he and defendant entered into certain partnership transactions in 1818; that in 1821 the defendant proposed that they should close their concerns, to which plaintiff assented; that plaintiff had been unable to obtain an account of the affairs of the partnership, and therefore prayed that the court would order him to be furnished with a true statement of the accounts. Upon this petition an order was made that the defendant should appear in court on the 6th of June to answer such questions as might be put to him touching the matters set forth in the petition. On the 13th of June, Joseph Soper, junior, as the attorney of his father, J. Soper, senior, appeared in court, and stated that he had it not in his power to answer; in consequence of which the cause was ordered to stand over until November then next, to allow defendant time to produce a statement of the partnership accounts. On the 6th of December, 1825, the plaintiff in his own proper person, and the defendant by his attorney, J. Soper, junior, prayed the court that all matters in difference between them might be submitted to the arbitration of A. B. and C. D.; that the court would be pleased to appoint an umpire, and that the award of the arbitrators, signed and delivered into court, might be made a rule of the supreme court, and be considered final and binding on them, plaintiff and defendant. To which prayer the court assented, and P. M. Esq. was by the court appointed umpire. On the 25th of January, 1826, an award was made, and

on the 12th of July, 1826, this award was set aside by the supreme court, and the arbitrators were authorized to enter into a new investigation of the accounts between the parties, upon Mr. Soper's paying all the costs already incurred in the proceeding. On the 16th of July the arbitrators made a second award, and thereby found that Soper was indebted to Henley in the sum of 60*l.* 2*d.*, and for the amount of this award the supreme court gave judgment for the plaintiff on the 31st of July, 1826, and on the 5th of July, 1827, the court taxed and allowed the plaintiff's costs at 56*l.* 9*s.* 11*d.* In order to prove the authority of J. Soper, junior, to appear and act as agent for his father in the supreme court, a letter was given in evidence written by the defendant to the plaintiff on the 9th of April, 1821, wherein he stated that he was determined on dissolving his connection with the plaintiff, and in order to facilitate that object, had given his son a power of attorney to act on his behalf, with authority to appoint any other person as he might see fit. And also a petition from the defendant to the supreme court, dated the 30th November, 1825, praying for further time to produce his accounts before the arbitrators. For the defendant it was contended that the proceeding in the supreme court was in the nature of a bill in equity for an account of partnership transactions, and that the money awarded was for a demand which could not be sued for in the courts of law in this country, therefore no action was maintainable on the judgment; secondly, that the authority given to the defendant's son did not warrant a submission to arbitration; and, thirdly, that the second reference did not appear to be made with the assent even of Soper, junior. The learned Judge directed the jury to find for the plaintiff for the amount of the foreign judgment, together with the taxed costs and interest, and gave the defendant leave to move to enter a nonsuit.

*Wilde*, Serjt., now moved accordingly. The case of *Carpenter v. Thornton*, 3 B. & A. 52, decided that an action will not lie on the decree of a court of equity in this country unless the decree is made for a demand constituting a debt at law. Now it cannot be supposed that this court will give greater effect to the decree of a colonial court than to a decree of the High Court of Chancery. The decree in this case was for money due on a partnership account, for which no action at law could have been maintained in this country. In *Sadler v. Robins*, 1 Campb. 253, which was an action on a decree of the Court of Chancery, in Jamaica, made for payment of a certain sum after deducting the defendant's costs, it was held that the action would not lie. It would be very inconvenient if this action were held to be maintainable, for the foreign judgment is only *prima facie* evidence of the debt, *Phillips v. Hunter*, 2 H. Bl. 410, *Walker v. Witter*, 1 Doug. 1; and the defendant must have liberty to go into evidence of the partnership accounts, in order to answer the plaintiff's *prima facie* case. At all events, the plaintiff cannot recover the costs and interest. Secondly, the authority given by the defendant to his son to settle his affairs did not extend to the mode adopted, viz. by submitting them to arbitration; and there is not any evidence that the son assented to the second reference which the court must be taken to have ordered *proprio vigore*.

Lord TENTERDEN, C. J. I am of opinion that the verdict in this case was right. The action was founded on a decree of a colonial court, which in substance fixed the amount of a balance due from one of two partners to the other. There is a great difference between the decree of a colonial court and of a court of equity in this country. The colonial court cannot enforce its decrees here, a court of equity in this country may; and, therefore, in the latter case there is no occasion for the interference of a court of law in the former there is, to prevent a failure of

justice. There is another difference, also : in considering the proceedings of a colonial court, we must look at the substance and not at the form, according to the rule adopted by the privy council. If we, sitting in England, were to require in the proceedings of foreign courts all the accuracy for which we look in our own, hardly any of their judgments could stand. With respect to *Carpenter v. Thornton*, I think it does not establish the broad principle for which it was cited. It appears by the report that I then expressed myself with much caution, and I do not find that I ever said that a decree of a court of equity, fixing the balance due on a partnership account, could not be enforced in a court of law, unless the items of the account could be sued for. My judgment proceeded on the particular circumstances of that case : the bill was for the specific performance of an agreement, which is a matter entirely of equitable jurisdiction. But it is a general rule, that if a partnership account be settled, and a balance struck by due authority, that balance may be recovered in an action at law. In the present case, the first step appears to have been taken by the plaintiff to procure an adjustment of the partnership accounts. The defendant's son, acting under a power of attorney, appeared for his father, who was thereby made virtually a party to the suit. Then the accounts were referred to arbitration. The first award made by the arbitrators was certainly by the authority of the defendant, but that award was disturbed ; and it is said that neither the defendant nor any person on his behalf consented to the second reference. But looking at the substance of the proceedings, and considering that the second reference took place upon the defendant's paying the costs of the first, we must presume that it was made at his instance. Then we find the balance of a partnership account duly ascertained, and a decree made for payment of it ; and I think a promise to pay the debt ascertained by that decree may and ought to be presumed. If so, there is no fault to be found with the verdict in this case. In the case of *Sadler v. Robins*, the sum due on the decree was left indefinite, the costs which were to be deducted never having been taxed ; but Lord *Ellenborough* said, that, had the decree been perfected, he would have given effect to it as well as to a judgment at common law.

BAYLEY, J. I am of the same opinion : and it appears to me that the case of *Carpenter v. Thornton* does not militate against our present decision, for there the only obligation on the defendant was to pay something awarded on equitable principles. But an action at law is always maintainable for the balance of a partnership account duly ascertained ; and it cannot make any difference that the balance in the present case was settled by the Court instead of by the parties themselves out of Court. Then it is said that Soper's son had no authority to submit the accounts to arbitration ; but I think he had such power, and that we must presume his assent to the second reference, inasmuch as it was ordered upon payment of costs by him.

HOLROYD, J. But for the case before Lord *Ellenborough*, I should have entertained some doubts upon the present question. That, however, is an authority in favor of an action upon the decree of a foreign court of equity if duly perfected. Here the decree was perfected.

LITLEDALE, J. I am entirely of the same opinion as to the sum decreed to be paid as the balance of the partnership account, nor do I see any objection to the demand of the other two sums for costs and interest

Rule refused.

DOE, on the demise of OLDHAM and Wife, v. WOLLEY. — p. 22.

A will more than thirty years old may be read in evidence, without proof of its execution, although the testator has died within thirty years, and some of the subscribing witnesses are proved to be still living. After the lapse of a period of more than 100 years: Held, also, that in the absence of evidence to the contrary, the death of a party without issue might be presumed.

EJECTMENT for lands in Worcestershire. Plea, the general issue. At the trial before *Vaughan*, B., at the last Spring assizes for Worcester, it appeared that the lessors of the plaintiff claimed as devisees of Frances Wolley, who was said to be heir of T. Wolley, who died in 1800, seised of the estate in question, having devised it to his widow for life, remainder to his right heirs. This will was dated the 21st February, 1798, more than thirty years before the trial, but one of the subscribing witnesses was proved to be still living; and it was insisted for the defendant that he must be called to prove the execution of the will, as the testator had died within thirty years. The learned Judge thought that the thirty years must be computed from the date of the will, and overruled the objection. In order to prove that Frances Wolley was heir of T. Wolley, the testator, a deed was produced, being a settlement made in 1689, on the marriage of Thomas Wolley, the grandfather of T. Wolley, the testator; by which it appeared that he had several brothers, of whom Edward, the grandfather of Frances Wolley, was the youngest. No evidence was given to show what had become of the other brothers, or that they died without issue. But wills of some members of the family, made after the date of the marriage-settlement, were produced, and they did not mention any brothers, except the grandfather of T. Wolley, the testator, and the grandfather of Frances Wolley. The learned Judge said that, in the absence of any evidence to the contrary, the jury might presume that they died without issue, and the jury found a verdict for the plaintiff.

*Campbell* now moved for a new trial on two grounds; first, that the will of T. Wolley was improperly received in evidence, for that the plaintiff should have called the existing subscribing witness to prove the due execution of it. There is a great difference between deeds and wills; the former take effect from the execution, the latter from the death of the testator. They should not, therefore, be received in evidence without proof of the execution, until thirty years from the death of the testator have elapsed. Besides, whatever might be the case, if the witnesses could be presumed to be dead, that cannot apply where evidence of their existence has been given. In *M'Kenire v. Fraser*, 9 Ves. 5, it appears to have been thought that the evidence of a subscribing witness to a will, bearing date more than thirty years before the trial, could not be dispensed with, unless it were shown that he could not be found. Secondly, the learned Judge ought not to have allowed the jury to presume that the elder brothers of Frances Wolley's grandfather died without issue. *Doe v. Griffin*, 15 East, 293, goes further than any former case: there it was proved that a person went abroad and died there, and that none of his family ever heard that he was married, and it was held that he might be presumed to have died without issue; but there the party having died abroad, other evidence could hardly be expected, and that was contrary to the case of *Richards v. Richards*, cited in a note to the report.

Lord TENTERDEN, C. J. As to the first point I am of opinion that the rule of computing the thirty years from the date of a deed is equally applicable to a will. The principle upon which deeds after that period are received in evidence, without proof of the execution, is, that the witnesses may be presumed to have died. But it was urged that when the existence of an attesting witness is proved, he must be called. That, however, would only be a trap for a nonsuit. The party producing the will might know nothing of the existence of the witness until the time of the trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant. As to the other point, it must at all events be admitted, that the death of the grandfather's brothers might be presumed, and then, in order to raise the objection, two affirmatives must be presumed; viz. that they did marry, and did leave issue. I think that would be very unreasonable, and that the direction of the learned Judge was right.

Rule refused.

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DOE, on the demise of the Honourable HENRY WATSON, Clerk, v.  
B. W. FLETCHER, Clerk.—p. 25.

Where a party was presented to a rectory in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void, on the ground that it was simoniacal, and the king then presented A. B., and he was instituted and inducted: Held, that he might maintain ejectment for the rectory against the person who had been simoniacally presented.

THIS was an ejectment brought to recover the rectory of the parish church of Kettering, in the county of Northampton, with the appurtenances; and also the rectory manor of Kettering, otherwise called the rectory manor, with the rights, members, and appurtenances to the said manor belonging; and also all tithes of corn, &c., arising and growing within the parish of Kettering, demised by the Honourable H. Watson, clerk, to the plaintiff for a certain term not yet expired. Plea, not guilty. At the trial before *Holroyd, J.*, at the last assizes for the county of Northampton, it appeared that the defendant had been presented to the rectory of Kettering by Lord Sondes in 1814, and that he was inducted on the 14th of October in that year, and on that occasion entered into a bond with a penalty of 12,000*l.*, the condition of which, after reciting "that Lord Sondes was the patron of the rectory which had then become vacant by the death of J. Knight, the late incumbent, and that Lord Sondes, by deed bearing equal date with the bond, had presented Fletcher (the defendant) to supply the vacancy, and to be rector, in order that he might be instituted and inducted thereto by the ordinary; and that Fletcher had agreed to resign the rectory into the hands of the ordinary upon such request and notice as therein mentioned, so as that the said rectory might thereby again become vacant, to the intent and for the sole and only purpose that Lord Sondes might be enabled to present thereto either Henry Watson or Richard Watson (his brothers,) when such of them as should be so presented should be capable of taking an ecclesiastical benefice," was, that Fletcher should, upon the request of Lord Sondes, resign the rectory and parish church of Kettering, with the appurtenances, in order that he, Lord Sondes, might present to the said rectory either Henry Watson or Richard Watson, when such of them as was to be so presented should be capable of taking an ecclesiastical benefice. This bond was held by the House of Lords, in

1826, to be void, 3 Bing. 501. The King, on the 26th of July, 1827, presented H. Watson, the lessor of the plaintiff, to the rectory; and he, notwithstanding impediments, read himself in so as to comply with the statutes 13 & 14 Car. 2, c. 6, s. 1. It was contended that the action of ejectment was not maintainable, and that the plaintiff ought to have proceeded by quare impedit. The learned judge overruled the objection, and a verdict was found for the plaintiff; but liberty was reserved to the defendant to move to enter a nonsuit.

*Clarke* now moved accordingly. The action of ejectment was not maintainable. The defendant was presented, instituted, and inducted into the rectory; he was therefore in possession; the church was full, and he could only be removed by quare impedit; *Rex v. The Bishop of Norwich*, Cro. Jac. 385.

Lord TENTERDEN, C. J. The lessor of the plaintiff had been presented, instituted, and inducted. He was therefore put into corporeal possession of the church, with the rights thereto belonging, and ejectment therefore was maintainable. Quare impedit is the proper remedy where the church is full; but here the church was void, because the presentation, institution, and induction of Mr. Fletcher having been made in consideration of the resignation bond which was simoniacal, were void by the statute 31 Eliz. c. 6, and the right for that turn belonged to the King. The church, therefore, was not full at the time when the lessor of the plaintiff was presented.

Rule refused.(a)

(a) See *Winchcombe v. The Bishop of Winchester*, Hob. 165.

### The KING v. The Inhabitants of ASHLEY HAY.—p. 27.

Since the statute 6 Geo. 4, c. 57, in order to gain a settlement by settling upon a tenement, the reserved rent for one whole year (whatever be its amount) must be paid.

UPON appeal against an order of two justices for the removal of J. Sneap, his wife and children, from the township of Ashley Hay, in the county of Derby, to the township of Mugginton, in the same county; the sessions quashed the order, subject to the opinion of this Court on the following case:—

At Lady-day 1825, the pauper, J. Sneap, being legally settled in Mugginton, hired a farm in Ashley Hay by the year, at the rent of 54*l.* per annum, payable half-yearly. He held and resided upon the said farm for more than twelve months, and he paid rent on account of the same to the amount of 40*l.*, but he did not pay a whole year's rent for the same prior to his becoming chargeable to and his being removed by Ashley Hay township. He was, prior to the 22d of June, 1825, charged in respect of the farm in two assessments for the relief of the poor, and with the public taxes of Ashley Hay township, and applications were made to him for payment of such taxes prior to the said 22d of June, 1825, but he did not pay the same till after the 10th of July, 1825.

*N. R. Clarke* in support of the order of sessions. The pauper gained a settlement in Ashley Hay by reason of his having rented a tenement at an annual rent exceeding the value of 10*l.*, and having paid more than 10*l.* on account of one year's rent. The question raised by this case (which was reserved by the sessions before *Rex v. Ramsgate*, 6 B. & C. 712, was published) is, whether the statute 6 G. 4, c. 57, requires that the whole year's rent should be paid, or rent to the amount of 10*l.* only. It must be con-



ceded that in *Rex v. Ramsgate* it was decided by this Court that since the 6 G. 4, no settlement could be gained by settling upon a tenement, unless the entire rent reserved for the term of one whole year (whatever be its amount) be actually paid. Such a construction of the statute, however, makes the words "for the term of one year at least" wholly inoperative; and this inconvenience will arise from it, that in every case it will be a question of fact whether the whole rent was paid. That case was not decided by the whole Court. The object of the statute was to give a party a settlement who occupied property of the annual value of 10*l.* and paid rent to that amount.

*Fynes Clinton*, contra, was stopped by the Court.

LORD TENTERDEN, C. J. I entirely concur in the judgment delivered by the Court in *Rex v. Ramsgate*, and in the reasons upon which that judgment was founded. That case is expressly in point, and must govern our decision in the present. No settlement was gained in *Ashley Hay*, because one year's rent was not paid, and the order of sessions must, therefore, be quashed.

Order of sessions quashed.

### The KING v. The Inhabitants of BIRMINGHAM.—p. 29.

Where a marriage was solemnized by license between a man and woman, the former being a minor, whose father was living, and who did not consent to the marriage: Held, that it was nevertheless valid, the 4 G. 4, c. 75, s. 16, which requires such consent, being directory only.

Where the marriage of a female pauper is brought about by the fraud of parish officers, that does not prevent her from acquiring a settlement by the marriage in the husband's parish.

UPON an appeal against the order of two justices for the city and county of the city of Coventry, whereby Luke Smith and Elizabeth Smith his wife were removed from the united parishes of Saint Michael and the Holy Trinity, in the city and county of the city of Coventry, to the parish of Birmingham, in the county of Warwick, the court of quarter sessions confirmed the order, subject as to so much of the order as respects the settlement of Elizabeth Smith, therein described as the wife of Luke Smith, to the following case:—

The pauper, Luke Smith, was married to Elizabeth Smith, then Elizabeth Bratt, in the year 1826, by license, he then being a minor under the age of twenty-one years, and having his father then living, who did not consent to his said marriage. It was objected by the appellants that his marriage was void under the new marriage-act, stat. 4 G. 4, c. 76, for want of the father's consent: the objection was overruled by the court. The appellants then offered evidence to prove that at the time of said marriage Elizabeth Smith, then Elizabeth Bratt, was settled in and chargeable to the parish of Little Packington, and that the marriage was effected and brought about by a fraudulent contrivance and conspiracy of the overseers of the parish of Little Packington, for the purpose of changing the settlement of Elizabeth Smith, then Elizabeth Bratt, from the parish of Little Packington to the parish of Birmingham, in which Luke Smith was then settled. The court of quarter sessions refused to admit the evidence, and confirmed the order of removal, subject to the opinion of the Court of King's Bench, first, upon the validity of this marriage within the provisions of the statute 4 G. 4, c. 76; secondly upon the propriety of the rejection of the abovementioned evidence.

*Amos* and *Hill* in support of the order of sessions. This question depends upon the last marriage-act, 4 G. 4, c. 76, and that does not make the consent of parents requisite to the validity of a marriage by license, although the parties may not be of age. By the 26 G. 2, c. 33, s. 11, such consent was made essential to the validity of the marriage; but that section was specially repealed by the 3 G. 4, c. 75, s. 1, which recites that great evils and injustice had arisen from the provision. In the eighth and subsequent sections of the latter statute certain new provisions are made respecting the solemnization of marriages. Those new provisions were repealed by the 4 G. 4, c. 17, and the regulations contained in the 26 G. 2, c. 33, re-established. But so much of the 26 G. 2, c. 33, as was then in force, and the 4 G. 4, c. 17, were finally repealed by the 4 G. 4, c. 76, s. 1; so that the present question turns entirely upon the provisions of the latter statute, and the former enactments may be altogether laid out of consideration. By the sixteenth section it was enacted, "That the father, if living, of any party under twenty-one years of age (such party not being a widower or widow), or if the father shall be dead, the guardian or guardians, &c., shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." It will be argued, that as the law requires the consent of the father, if it be not given, the marriage is void. But throughout the marriage-act there is a great difference between an objection that avoids a marriage and one which makes it the duty of the clergyman not to proceed with the marriage if it be known to him. In section 22, certain cases are specified in which the marriage shall be null and void to all intents; but the case of a marriage without consent of parents, &c. is not mentioned. Again, in section 23, it is enacted, "that if any *valid* marriage, solemnized by license, shall after, &c. be procured by a party to such marriage to be solemnized between persons one or both of whom shall be under the age of twenty-one years, contrary to the provisions of this act, by means of such party falsely swearing to any matter to which such party is hereinbefore required personally to swear, &c. such party shall forfeit all property accruing from the marriage." And the statute then goes on to provide, that it shall be secured under the direction of the Court of Chancery or Exchequer, for the benefit of the innocent party or the issue of the marriage. The legislature, therefore, clearly contemplated that valid marriages might be celebrated without proper consent; and this is also manifest from the provision made for the issue. If the marriage were void, the issue would be illegitimate, and it is not probable that the act would have continued a provision in their favour. As to the second point, it is clear that the justices did right in rejecting the evidence of fraud; for although a marriage be brought about by means of the fraudulent practices of overseers, it is not on that account void; *Rex v. Watson*, 1 Wils. 41; *Rex v. Tarant*, 1 Bott, 338.

*Goulburn* and *Waddington*, contra. Mr. Nolan in his treatise lays it down as a general rule that no settlement can be legal which is brought about by practice or compulsion, vol. i, p. 290. [Lord *Tenterden*, C. J. Does the rule go further than this, that the Court will prevent a fraud from having its effect when that can be done without violating some higher and more important rule? *Bayley*, J. Mr. Nolan treats the case of marriage as an exception from the general rule before mentioned, p. 290, n. 2, and 292, n. 7.] Then as to the first and principal question, by the 26 G. 2, c. 33, s. 11, it was expressly enacted, that the marriage of a minor, solemnized by license, obtained without the requisite consent of parent or guardian, should

be *null and void*. Those words are not found in the sixteenth section of the 4 G. 4, c. 76; but the omission of them is not sufficient to make the marriage valid, if there are other words used which show a contrary intention in the legislature. Now section 14, points out the duty of the surrogate on granting the license: he is not to make inquiry, but merely to take the oath of the party as to the consent of parents, &c., and other matters there specified. Then section 16, specifies who shall have authority to give consent to the marriage of minors, and then proceeds: "And such consent is hereby *required* for the marriage of such party so under age, unless there shall be no person authorized to give such consent." That cannot be directory to the person granting the license, for his duty is pointed out by the fourteenth section. It must, therefore, apply to the parties themselves; and it would be very absurd if the legislature required of them to procure the consent, and yet made the marriage good without it, for that would leave it entirely in the option of the party to obey the statute or violate it. Unless, therefore, the want of consent vitiates the marriage, section 16, is altogether nugatory. Then, as to the expression "if any *valid* marriage," &c., in section 23, relied on by the other side, it shows that some marriages solemnized by license without complying with the provisions of the act might be invalid, others valid; and this is explained by section 26, which says, that where a marriage has been by license, it shall not be necessary to prove previous residence in the parish, and that evidence to the contrary shall not be admitted in any suit touching the validity of the marriage. The legislature, therefore, must have thought that but for such proof or such saving provision, a marriage solemnized by license would be void; the protection, however, is not extended to the case of a marriage without consent of parents, &c., and therefore the truth of that fact remains material, although the truth or falsehood of the assertion as to residence is rendered immaterial.

*Cur. adv. vult.*

On the following morning the judgment of the Court was delivered by

LORD TENTERDEN, C. J. We have considered the various statutes referred to by counsel, and are all of opinion that the marriage in question is valid. A marriage under such circumstances would by the 26 G. 2. c. 33, s. 11, have been void, but the 3 G. 4, c. 75, s. 1, recites that section, and that it had been productive of great evils and injustice, and then proceeds to enact, "that so much of the said statute as is hereinbefore recited, as far as the same relates to any marriage to be hereafter solemnized, shall be and the same is hereby repealed." The second section enacted, that marriages theretofore solemnized by license, without such consent as required by the former act, should be valid, with certain limitations imposed by the third and four following sections. Then the eighth and subsequent sections contained new provisions as to granting licenses in future. These were repealed by the 4 G. 4, c. 17, which restored certain parts of the 26 G. 2, c. 33, and some question might be raised as to whether that part of the 3 G. 4, c. 76, remained in force which repealed the 11th section of the 26 G. 2. But that question is now rendered immaterial by the 4 G. 4, c. 75, which repealed the 4 G. 4, c. 17, and so much of the 26 G. 2, c. 33, as was then in force. The only statute, therefore, now to be considered is the 4 G. 4, c. 75, the fourteenth section of which points out the mode in which licenses are to be obtained, and the matters to be sworn to by the parties or one of them; and one of those matters, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, is, that the consent of the person or persons whose consent to such marriage is required, under the provisions of this act, has been obtained thereto.

Then the sixteenth section specifies the persons who shall have power to consent, and proceeds, "and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." The language of this section is merely to *require* consent, it does not proceed to make the marriage void, if solemnized without consent. Then the twenty-second section declares, that certain marriages shall be null and void, and a marriage by license without consent is not specified. Thus far, therefore, the question depends upon the direction in the sixteenth section; and if there were any doubt upon the construction of that section, it would be removed by the twenty-third, which enacts, that "if any valid marriage solemnized by license shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under age, by means of falsely swearing to any matter to which such party is required personally to depose," *not* that the marriage shall be void, but that all the property accruing from the marriage shall be forfeited and shall be secured for the benefit of the innocent party, or the issue of the marriage. This is a penalty for disobeying the direction of the legislature given in the sixteenth section, and is calculated to prevent fraudulent and clandestine marriages, by depriving the guilty party of the pecuniary benefit, which is most commonly the inducement moving to the fraud. For these reasons it appears to us that the marriage in this case is valid, and the order of sessions right.

Order of sessions confirmed.

**R. B. BURLEIGH and Others, Executors and Executrix of ROBERT BURLEIGH, deceased, v. E. STOTT, Administratrix of T. STOTT, deceased.** — p. 36.

To an action upon a joint and several promissory note of A. and B., the latter being a mere surety, brought by payee against the administrator of B., the defendant pleaded that the cause of action did not accrue within six years, upon which the plaintiff took issue. The plaintiff proved that within six years, and during the lifetime of B., A. made a payment on account of the note. B. afterwards died: Held, that such payment operated as a new promise by B. to pay, according to the nature of the instrument, and that his administrator was liable on the note.

**ASSUMPSIT** on a promissory note made by T. Stott, the intestate, dated 4th March, 1818, for 600*l.*, payable to Robert Burleigh, with interest. Common money counts. Plea, first, the general issue, upon which issue was joined; secondly, the statute of limitations. The plaintiffs replied, a writ issued on the 3d of October, 1826, by the plaintiffs as executors against the defendant as administratrix. Rejoinder, admitting the writ, but alleging that the causes of action did not accrue within six years of the issuing of the same, upon which issue was joined. At the trial, before Lord *Tenterden*, C. J., at the London sittings before Michaelmas term, 1827, a verdict was found for the plaintiffs for 625*l.*, subject to the opinion of this Court on the following case: On the 4th March, 1818, Thomas Burleigh and Thomas Stott signed the following promissory note:

“£600

London, 4th March, 1818.

“On demand we jointly and severally promise to pay Mr. Robert Burleigh the sum of six hundred pounds, with lawful interest thereon.”

The note was given by T. Burleigh to Robert Burleigh for money lent, and T. Stott was merely a surety. On the 10th October, 1818, T. Burleigh paid to Robert Burleigh the interest then due on the note, and the following indorsement was thereupon made upon it by Robert Burleigh: “Received the interest on this note to the 10th October, 1818. R. Burleigh.” On the 10th October, 1820, T. Burleigh paid to Robert Burleigh the interest then due on the note, and 100*l.* on account of the principal, and thereupon the following indorsement was at the same time made upon the note by Robert Burleigh: “Received the interest on this note to the 10th October, 1820; also 100*l.* on account of the principal, leaving due 500*l.* R. Burleigh.” From his signing the note till his death, T. Stott had no communication with Thomas Burleigh about the note. Robert Burleigh always applied to Thomas Burleigh for money. The payments on the 10th October, 1818, and 10th October, 1820, were made by Thomas Burleigh, without any communication with T. Stott. T. Stott died on the 3d March, 1821, and Robert Burleigh died on the 8th July in that year. The writ of latitat in this cause was duly issued on the 3d October, 1826. The question for the opinion of this Court was, Whether the plaintiffs, under these circumstances, were entitled to recover?

*Chitty* for the plaintiff. The part-payment of the money secured by the note within six years by Burleigh operated as a fresh promise by Stott to pay the residue. Where the fact that several persons are partners has once been established, the act or declaration of one partner relating to the subject-matter of the partnership is evidence against the rest, although the admission be made after a dissolution of partnership, *Wood v. Braddick*, 1 Taunt. 104. In *Whitcomb v. Whiting*, Doug. 652, the acknowledgment of one out of several makers of a joint and several promissory note was holden sufficient to take it out of the statute of limitations as against the others, and that upon the ground that payment by one was payment by all; that the one acted virtually as agent for the rest, and that an admission by one was an admission by all, and that the law raised a promise to pay when the debt was admitted to be due. And in *Perham v. Raynal*, 2 Bingh. 306, it was held, that an acknowledgment within six years by one of two joint makers of a promissory note revived the debt against the other, although that other had made no acknowledgment, and only signed the note as a surety. In *Atkins v. Tredgold*, 2 B. & C. 23, the payment was made after the death of one of the promisors, and the other was liable as survivor. It was a payment made by him in his own right and on his own account, and not on account of or as agent for A. But in this case the payment was made during the life of T. Stott, and he, by signing, had made his co-promisor his agent for the purpose of making any payments on the note, and the latter executed the authority by making the several payments. The intestate was bound by those payments in the same way as he would have been if he had made them himself. They were, therefore, admissions by him that at the time when they were made the debt existed, and the law will raise a promise by him to pay the same.

*Alderson*, contra. An acknowledgment made within six years operates as a new substantive promise to pay the debt, and not as drawing down the original promise to the time when the acknowledgment is made, *Pittam v. Foster*, 1 B. & C. 248. It is not true, therefore, that the statute of limita-

tions proceeds on the presumption that the debt has been satisfied. Suppose instead of one note there had been three, one joint by A. and B., one separate by A., and one separate by B., a payment by A. on the joint note will operate as a payment by B. on that note, but not on his separate note. After Stott died the joint note was at an end, and the plaintiff was compelled to sue on the note as if it were the several note of the defendant; and the case must be considered as if the action were brought on the separate note of B. The admission which would clearly have supported an action on the joint note will not support one on the separate note. The whole question depends on this, whether one of two persons jointly and severally liable is agent for the other for all purposes connected with the note, whether he be agent to make acknowledgments and to make payments. He is agent to the co-promisor as far only as their joint obligation extends, but no further. *Whitcomb v. Whiting*, Doug. 652, has been frequently questioned, and the decision in that case is at variance with *Brund v. Haslerig*, Doug. 652; *Jackson v. Fairbank*, 2 H. Bl. 340, was also questioned in the case of *Brandram v. Wharton*, 1 B. & A. 463. In *Perham v. Raynal*, the action was brought on a joint note.

LORD TENTERDEN, C. J. I am of opinion that the plaintiffs are entitled to recover. I quite agree with the late decisions which have established, that, in order to satisfy the statute of limitations, there must be evidence of a promise to pay within the six years. But I think that, in this case, there was sufficient evidence of a promise by the intestate within six years to pay jointly and severally according to the form of this note. Suppose the note had been joint only; there could not have been any doubt that a part-payment by one of the joint promisors would refer to the nature of the note, and operate as an admission by all the joint promisors that the note was unsatisfied, and therefore as a promise by all to pay the residue. Here the note is joint and several, and the plaintiffs are bound to sue as if it was the several note of the intestate, because Stott, one of the joint promisors, is dead. It is said that it must be considered as if there were three notes, one joint and two several notes, and that the payment by one only operates as an admission so far only as the joint promise is concerned, and no further, and, consequently, that the joint promise being at an end by the death of one of the copromisors, the action is not maintainable. If we were so to hold, I think we should put the law on too nice a distinction. I am of opinion that a part-payment by one is an admission by both that the note is unsatisfied, and that it operates as a promise by both to pay according to the nature of the instrument, and, consequently, as a promise by the defendant's intestate to pay on this his several promissory note. The judgment of the Court must, therefore, be for the plaintiff.

BAYLEY, J. I consider this as a joint and several promissory note. I think that the part-payment by one operates in point of legal effect as a new promise, by all and each of the promisors, to pay according to the nature of the instrument.

HOLROYD, J. *Whitcomb v. Whiting*, Doug. 652, and *Jackson v. Fairbank*, 2 H. Black. 340, are in point, and must govern the present case. It is conceded that part-payment by one of two joint promisors within the six years, being an admission that the note is unsatisfied, operates as a promise by both to pay the joint note. I also think that such payment operates as a new promise to the full extent of the original promise contained in the instrument. The joint and several promises apply to the same sum of money. It was a joint debt, though there was a several promise by each to pay it. In the case of a joint and several bond, pay-

ment by one operates as payment by all. (See Bac. Abr. tit. Obligation, D. 4.) So a release to one is a release to all. In this case, Stott has had the benefit of the part-payment, and he ought to bear the burden. It seems to me that where two persons jointly and severally promise to pay one and the same sum of money, each of them makes the other his agent for the purpose of making any payment in respect of that sum of money. That being so, then, Burleigh made the payment in question as the agent and by the authority of Stott. It was, therefore, an admission by the latter that the sum remaining due on the note was an existing debt, and it operated as a fresh promise by him to pay the same.

Judgment for the plaintiffs

The DOCK COMPANY at KINGSTON-UPON-HULL v. LA  
MARCHE. — p. 42.

By an act of parliament, certain persons were incorporated as the Hull Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorized to make a dock, quays, wharfs, &c., which, it was enacted, should be vested in them for the purposes of the act. Amongst other things, it was provided that "all goods, &c., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that act, should be liable to pay, and should be charged and chargeable with the like rates of wharfage and payments as were usually taken or received for any goods, &c., loaded or discharged upon any quays or wharfs in the port of London." Held, that as the premises were only vested in the Company for the purposes of the act, they had no common-law right to a compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays.

This was an action of indebitatus assumpsit for wharfage, with the usual money counts. Plea, the general issue. At the trial before *Bayley, J.*, at the Spring assizes for the county of York, 1827, a verdict was found for the plaintiffs, damages 7*l.* 5*s.* 3*d.*, subject to the opinion of this court on the following case:—

The plaintiffs were the dock company of Kingston-upon-Hull, who were incorporated under an act of parliament passed in the 14 G. 3. By the fifteenth section they were authorized within seven years to make a dock, and a quay or wharf, of a sufficient and convenient length, for the trade and business of the said town and port, which should range along the side of the dock next the town; which quay or wharf should be deemed and taken to be a legal quay or wharf for the landing and discharging, lading and shipping, of any goods, wares, and merchandise. By section 18, after reciting that in order to promote an undertaking so beneficial with regard to his Majesty's revenue, so useful to navigation, and so conducive to the advancement and security of commerce, his Majesty had been graciously pleased to signify his consent to grant and appropriate, for the purposes before mentioned, and no other, certain premises therein described: those premises were granted to the dock company, to be applied and appropriated for and to the uses and purposes before mentioned, and for the necessary purposes relative thereto, and no other. By the 42 G. 3, after reciting the former act, and that the dock made was insufficient for the increased trade of the port of Hull, and that the company were willing to make a new dock, quays, or wharfs, &c., on part of the premises granted to them by the former act, power was given to them so to do, and they are now the owners and proprietors of several quays or wharfs, and warehouses, situate on the side of the docks erected pursuant to those statutes. The claim made by the dock company was of the sum of 7*l.* 5*s.* 3*d.*, being the amount of wharfage due on goods loaded by the defendant, a merchant at Hull, on board certain vessels from their wharfs. It was admitted by the defendant

that the goods were so loaded, and that the sum of 7*l.* 5*s.* 3*d.*, if in law chargeable, was the proper amount according to the rate usually charged in the port of London. It was also admitted by the plaintiffs that the said goods had been previously landed at their wharfs, and had paid wharfage for such landing, and that after such payment a part of them had been removed to the premises of the defendant, and the other part to the premises of other persons, where they had respectively remained for some time previously to their being again brought to the plaintiff's wharfs to be so loaded as before mentioned. By section 45, of the 14 G. 3, it was provided as follows: "Provided also, and be it further enacted and declared, that all goods, wares, and merchandise which shall be *landed or discharged* upon any of the quays or wharfs which shall be erected by virtue of this act, shall be liable to pay, and shall be charged and chargeable with the like rates of wharfage and payments as are usually taken or received for any goods, wares, or merchandise *loaded or discharged* upon any quay or wharfs in the port of London, and shall be paid to the respective company and owners of the said quays or wharfs so to be erected as aforesaid, in like manner as the rates and duties established by this act are hereby directed to be paid." By a previous section (42) it was provided as follows: "And be it further enacted, by the authority aforesaid, that in consideration of the great charges and expenses which by the making, building, erecting, and providing such basin or dock, quay or wharf, reservoirs, sluices, bridges, roads, and works, and the supporting, maintaining, and keeping the same in repair for the future will amount unto, there shall be payable and paid from and after the said 31st day of December, 1774, to the said company, or to their collectors or deputies for their use, for every ship or vessel (the King's ships of war and other ships and vessels employed in his Majesty's service only excepted) coming into or going out of the said harbour, basin, or docks within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading or taking on board any of their cargo, or any goods, wares or merchandise within the said port, by the master or commander, owner or owners, of every such ship or vessel, the several rates or duties of tonnage according to the full of the reach and burden hereafter particularly rated and described; that is to say (here follows a scale of rates;) which rates or duties shall be and are hereby vested in the dock company as their own proper moneys, and to and for their own proper use and behoof, for the purposes aforesaid, and shall be paid at the time of such ship's or vessel's entry inwards, or clearance or discharge outwards; or in case any ships or vessels shall not enter as aforesaid, then at any time before such ships or vessels shall proceed from the said port, at the custom-house in the said port; so as no ship or vessel shall be subject or liable to the payment of the said rates or duties, or any of them, more than once for the same voyage both out and home, notwithstanding such ship or vessel may go out and return with a loading of goods or merchandise." And by the 42 G. 3, by which a new basin was authorized to be made, it was proved as follows: "And be it further enacted, that all goods, wares, and merchandize, which shall be *landed or discharged* on any of the wharfs which shall be made and built on the east and west sides, or north and south ends of the basin or dock, and entrance hereby directed to be made, shall be liable to pay, and shall be charged and chargeable with the like rates of wharfage and payments to the said dock company as are or may be taken or received by them for any goods, wares, or merchandise *loaded or discharged* upon the quays or wharfs of the basin or dock made in pursuance of the said recited act; and that the said dock company shall have and be entitled to the like powers and remedies for the recovery thereof as are given by the said recited act



for the recovery of the rates and duties thereby granted." Besides the quays or wharfs erected by the dock company under the different powers given by the 14 G. 3, there were also, in the town and port of Hull, certain other quays or wharfs, the property of different individuals, which quays or wharfs were erected pursuant to certain provisions in the third section of that act. By that section it was provided as follows: "And whereas there are certain staiths situate on the west side of the river Hull between T. W.'s ship-yard and a certain staith called Rotten Herring Staith, at which staiths the proprietors thereof have from time immemorial landed and discharged, laden and shipped goods, wares, and merchandise; and whereas it is reasonable that this privilege should be continued to the proprietors of the staiths, be it therefore further enacted, by the authority aforesaid, that when and as soon as the basin or dock hereinafter mentioned and directed to be made shall be fit for the reception of loaded ships, and not sooner, it shall be lawful for all and every the proprietors of the said staiths to build and make at their own expense and charge commodious quays or wharfs opposite to their said staiths respectively, to be erected upon piles of wood, and not otherwise, and to project into the haven of the said river Hull fifteen feet, to be open at all times to the officers of his Majesty's revenue by a free and clear communication with the common staiths adjoining; on which quays or wharfs, when so made and erected, it shall be lawful to ship off, land, and discharge all goods called sufferance goods, that is to say, hemp, iron, flax, yarn, timber, raff, and all other goods and merchandise whatever which are permitted to be shipped off or landed in the port of London as sufferance goods, and under the like regulations."

By his Majesty's order in council, dated 23d July, 1800, after reciting the act for rebuilding the city of London, and its provisions relative to wharfage rates on the quays there (which by that act were to be settled by an order in council), and that proper provisions for that purpose had not been made, and that a certain table of rates had been prepared, which table of rates is set out in the order, and is as follows:—

Alum, the ton,	-	-	-	-	s.	d.
Arsenic, the ton,	-	-	-	-	1	8
					1	8

and so on for other goods, a certain sum for each ton, bag, or hoghead, as the case may be, the said order in council concludes as follows: "His Majesty this day took the said table of rates for wharfage and crantage into his royal consideration, and hath assessed and allowed, set out and appointed, and doth hereby, with the advice of his privy council, assess and allow, set out and appoint, the said several and respective rates for wharfage and crantage contained in the said table, and doth order and appoint that such rates respectively, and no other, shall and may be taken for the wharfage and crantage of all such goods and merchandise respectively as are in the said table mentioned, which shall at any time hereafter, by any person whatsoever, be brought unto, shipped, loaden, or unloaden, at or from any wharf or wharfs within the city of London, or the liberties thereof, and that it shall and may be lawful for the present owner or owners, proprietor or proprietors, of the said wharfs, and his or their heirs or assigns, lessees, tenants, or undertenants, from time to time, and at all times hereafter, to demand of, and receive from, every person who shall hereafter bring unto, ship from, or load or unload at the aforesaid quays or wharfs respectively any such goods or merchandise respectively, the several rates for crantage and wharfage which by the aforesaid table are assessed and appointed to be paid for the same, and no other; and to the intent all persons concerned may know what they are to pay for the crantage and wharfage of their goods as aforesaid, it

is further ordered, that this order and table of rates be published in the London Gazette, and that a copy of the said table of rates shall, according to the direction of the aforesaid act of parliament, be kept constantly hanging up in the most public part and place of each and every of the said wharfs or quays, and another at the Custom House, for all persons concerned to resort unto, and make use of as they shall have occasion.

The case was argued on a former day in this term by

*Alderson* for the plaintiffs. There are two questions in this case; first, whether the act is really ambiguous; and, secondly, whether that ambiguity is to operate against the claim of the plaintiffs, or against the restriction of their general right; and that will depend upon whether at common law they would be entitled to wharfage for goods shipped off from their quays as well as for those landed on them. If their rights are founded altogether upon the act of parliament, the ambiguity must operate against them, according to the principle laid down in two modern cases; *Waterhouse v. Keen*, 4 B. & C. 200, which was a claim of toll on a public road, and *Denn v. Mansfold v. Dimond*, 1b. 243, a question on the stamp act. But the present case states that the plaintiffs are owners of the quays and wharfs, and, therefore, at common law, they would be entitled to a remuneration for the use of them; *Hale de portibus maris*, pt. 2, c. 6. The London act 22 C. 2, c. 11, s. 21, makes this clear. It recites that great exactions have been, and are, exercised by wharfingers and others employed about the wharfage and cranage of goods landed or shipped off, at, or from the city of London, and for remedy enacts, that such rates, and no other, shall from time to time be taken for wharfage and cranage as by his Majesty, with the advice of his privy council, shall for that purpose be assessed and allowed to be taken. That was clearly a restriction of the common law right of wharfingers to charge what they pleased. So also the legislature, by providing that the Hull Dock Company should take the like rates of wharfage as are usually taken in the port of London, imposed a restriction on a common-law right; the restriction must, therefore, be clearly made out; and if it does not apply to goods shipped as well as to those landed, the plaintiffs, as owners of the wharfs, are still entitled to demand a remuneration for the use of them in shipping goods. It will be argued, on the other side, that the wharfage dues are to be likened to the tonnage dues, which are only payable once for out and home; but it is to be observed, that they are paid for going out. Then, as to the supposed ambiguity, the words of the act are, that "goods landed or discharged shall be charged with the like rates of wharfage as are usually taken for goods loaded or discharged upon any quay, &c., in the port of London." The object of the legislature appears to have been to put the wharfs in London and Hull upon the same footing: at the former wharfage is paid whether the goods are landed or shipped; it is, therefore, fair to conclude that in the Hull dock act the word *landed* was inserted by mistake for *loaded*. Upon any other supposition the word *loaded* in the latter part of the clause is altogether useless; and the owners of the private staiths who, before the act passed, clearly might have claimed to be paid for the use of them, either in shipping or landing goods, will be deprived of that privilege. The 14 G. 3, c. 56, s. 3, recites, that there were certain staiths at which the proprietors had from time immemorial landed and discharged, laden and shipped goods, and then gives the owners power to erect quays in lieu of them; s. 13 vests other staiths in the corporation, and gives them power to erect quays in lieu of them in the same manner as it was given to the other proprietors by s. 3; and s. 45 provides, that for all goods, &c., which shall be landed or discharged upon any of the quays or wharfs which shall be erected by virtue of this act, the same dues shall be taken as for

goods loaded or discharged in London. That applies equally to all quays, whether the property of the company or individuals, and, therefore, has the effect of controlling pre-existing rights, consequently it should not be construed so as to narrow and restrain them, unless the intention of the legislature so to do is quite apparent. The word *landed* is entirely without effect, and the idea that it was inserted by mistake for *loaded* is confirmed by the subsequent act 42 G. 3, which authorizes the company to take for the use of the new quays and wharfs the like dues as might be taken for goods *loaded* or *discharged* upon the quays made in pursuance of the former act. That provision would be absurd if no dues might be taken for goods loaded.

*Parke, contra.* The general rule as to construing acts of parliament which impose a charge on the public is applicable in this case, for the ownership of the quays is vested in the plaintiffs "for the purposes of the act, and no other." Their rights, therefore, depend entirely upon the statute, and of course are limited by it. If that be so, there is no longer any question to be discussed, for beyond all doubt, the words of the act do not impose the charge in unambiguous language. The words *landed* and *discharged* may be tautologous, but the act is not on that account to be altered; and if one wharfrage duty only be payable, that puts the owner of goods nearly in the same situation as the owner of a ship, who pays one duty for the voyage out and home. It is true, that according to this construction goods may go out of the dock without paying any dues, although a ship cannot; but that exemption may have been given for the purpose of encouraging the export trade. An argument has been raised as to the supposed hardship upon the owners of private staiths, but that does not in fact exist: their privileges are recited as immemorial, and they are enabled to substitute quays or wharfs for staiths, and all their old rights remain as before. Another argument was founded upon the 42 G. 3, in which the statute 14 G. 3, imposing the dues, is mis-recited. But the 3 J. 1, c. 14, recites that certain sewers only are within the 23 H. 8, and yet it has been held that such recital could not restrain the operation of the earlier statute; *Dore v. Gray*, 2 T. R. 358.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. Two points were made on behalf of the plaintiffs in this case; first, that they, as owners of the wharf, were at common law entitled to a remuneration for the use of the wharf; and, secondly, that they had such right upon the words of the statute. Our opinion is against them on both points. On the first, we think that under the statute in question the plaintiffs cannot claim anything that is not expressly given. It contains several recitals, and in particular that it is expedient that lawful quays should be established at the port of Kingston-upon-Hull for the shipping and landing of goods imported there, and exported from thence, in such manner as thereafter expressed. It then gives the owners of private staiths, and to the corporation of Hull, certain powers as to substituting quays for old staiths. It then enacts, that the mayor and burgesses of Hull, and certain other persons, shall be a corporation; and after reciting that his Majesty had consented to give them certain premises for the purposes of the act, it vests those premises in the Dock Company, "to be applied to the uses and purposes mentioned in the act, and no other;" and section 25, vests in them all quays, &c. made in pursuance of the act, except those substituted for staiths. A sum of money was given to them out of the revenues of customs, and other money was raised amongst themselves; and by section 42, in consideration of the expense of making and maintaining the dock, certain tonnage duties on shipping were given; and by section 45, the company were authorized to demand certain wharfrage dues. This was

clearly a bargain made between a company of adventurers and the public, and as in many similar cases, the terms of the bargain are contained in the act, and the plaintiffs can claim nothing which is not clearly given. We come, therefore, to the second question, viz. Whether the dues now claimed are clearly given by the act? The clause particularly applicable to this subject is the forty-fifth. It is in these words: "All goods, &c. which shall be *landed or discharged* upon any of the quays or wharfs which shall be erected by virtue of this act, shall be liable to pay, and shall be charged and chargeable with the like rates of wharfage and payments as are usually taken or received for any goods, &c. *loaded or discharged* upon any quays or wharfs in the port of London." The first part of the section specifies what goods shall be subject to charge, those *landed or discharged*. It then specifies what rates shall be taken, and they are the same as upon goods *loaded or discharged* in London. It is said that this word *loaded*, as the sentence stands, is clearly wrong; but we are not called upon to give an opinion as to that, the charge in London being the same both ways. It is further said, that to make the whole sensible, the word *landed*, in the former part of the section, should be read *loaded*; but at the same time it must be admitted that the language would still be inaccurate, for it would then speak of goods "*loaded upon*" the quays, whereas it should be "*loaded from*." But there are other parts of the statute which remove all doubt. It first recites the statute of Car. 2, relating to places for *shipping or loading*, and *landing or discharging* goods; then, that it was expedient to establish legal quays at Hull for the *shipping* and *landing* of goods exported and imported. Then it speaks of staiths at which the proprietors had for time immemorial *landed* and *discharged*, *laden* and *shipped* goods. It is, therefore, clear that the legislature knew how to use terms applicable both to *shipping* and *landing* when they wished to do so. Another argument was, that unless wharfage dues could be claimed by the company for shipping as well as landing, the owners of private staiths would lose that privilege. But it does not appear clearly that they ever had a right to wharfage dues both ways; and at all events, they are now in as good a situation as the Dock Company. For these reasons, we think that our judgment must be for the defendant.

Postea to the defendant.

### The KING v. The LONDON Gas Light and Coke Company.—p. 54.

The 7 G. 3, c. 37, which enacts, that certain lands to be embanked from the river Thames shall be "free from all taxes and assessments whatsoever," exempts the occupiers of premises built on those lands from payment of poor-rates in respect of such occupation.

UPON appeal against a rate made for the relief of the poor of the parish of St. Bride's, London, the sessions confirmed the rate, subject to the opinion of this Court on the following case: By a certain rate or assessment, being the rate or assessment appealed against, duly made and allowed by two justices of the peace for the city of London, on the 22d of September, 1826, on the several inhabitants and others, and every occupier of lands, houses, shops, warehouses, and other tenements or hereditaments within the parish of St. Bridget, otherwise St. Bride, in the ward of Farringdon Without, in the city of London, for and towards the relief, maintenance, and employment of the poor of the same parish, from Midsummer-day then last past to Michaelmas-day then next ensuing, the said rate being a rate or assessment of 1s. 6d. in the pound upon the annual rent or value of the said

lands, houses, shops, warehouses, and other tenements and hereditaments of and in the same parish, as far as the same could be ascertained, the city of London Gas Light and Coke Company was rated as follows:—

£1200.	The City of London Gas Light and Coke Company for houses, sheds, and premises, Daniel Benham, secretary, resident,	-	-	-	£90 0 0
£12.	The City of London Gas Light and Coke Company for houses and premises, Daniel Benham,	-	-	-	£0 18 0
£24.	The City of London Gas Light and Coke Company for houses and premises, Daniel Benham,	-	-	-	£1 16 0

The premises for which the company is rated and charged in the said assessment at the sum of 90*l.*, upon the annual rental or value of 1200*l.*, consist of a wharf, buildings, and premises abutting on the river Thames, near Blackfriars Bridge, held by the company under a lease granted by the New River Company, a part of which premises is in the said parish of St. Bridget, otherwise St. Bride, and liable to be rated thereto at the sum of 60*l.*, upon the annual rental or value of 800*l.*, and the remaining parts of such buildings, together with the wharf and premises, covering and comprising a space of 22,642 feet, superficial measure, which are assessed in the said rate, upon the annual rental or value of 400*l.*, and which the London Gas Light and Coke Company claim to be exempted from the said rate, are built upon ground and soil which were formerly part of the ground and soil of the river Thames, and were enclosed and embanked by the New River Company, and became vested in the City of London Gas Light and Coke Company as lessees for a term, yet unexpired, of the adjoining wharf and ground in front of which the said ground and soil of the said river were so inclosed and embanked. The inclosure and embankment were made by the New River Company under the act 7 G. 3, c. 37, by which (after reciting that it would tend to remove many inconveniences if the ground and soil of the river Thames between certain limits, including the land in question, was inclosed and embanked), it was enacted, that it should and might be lawful for the mayor, aldermen, and commons, in common-council assembled, to inclose and embank the said ground. By the second section the owners of wharfs abutting on this ground were authorized to inclose that part of it opposite their premises at their own expense, giving certain notices to the town clerk of the city; and by the 51st section it was enacted, that the ground and soil of the said river so to be inclosed and embanked in the front of every such wharf, should vest in the owner of such adjoining wharf, *free from all taxes and assessments whatsoever*. By the 52d section certain quit-rents were imposed upon the land so to be inclosed; and a quit-rent, amounting to 23*l.* 11*s.* 8*d.* per annum, payable by virtue of the act for the land in question, was redeemed by the New River Company, in the year 1769, for the sum of 471*l.* 14*s.* 2*d.* An act was passed in the 39 G. 3, entitled, "An act for the better relief and employment of the poor of the parish of St. Bridget, otherwise St. Bride, Fleet Street;" by the 18th section of which the churchwardens and overseers of the poor were required "to make one general equal pound-rate or assessment for and towards the relief of the poor, and other the ends and purposes of the act, upon all and every person and persons who did or should inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, coach-house, stable, cellar, vault, or any other building, tenement, or hereditament within the said parish, and on every other person and persons who by law was, were, or should be chargeable or liable to be assessed for or towards the relief of the poor." In the 7 G. 4, an act to amend this act was passed, but the 35th section, relating to the poor-rates, was the same as in the former statute.

The New River Company, whilst in possession of the ground and soil for which the exemption is now claimed by the London Gas Light and Coke Company, were several years regularly rated to the poor-rate of the parish of St. Bridget, otherwise St. Bride, in respect of the same, and of the buildings erected thereon, and paid their rates until 1825, when a new and higher assessment having been made, they objected to the rate, and claimed a total exemption. The question for the opinion of this Court was, Whether the said land, comprising the said space of 22,642 superficial feet, the said wharf and premises, and the said buildings erected thereon, and which are assessed in the said rate upon the annual rental or value of 400*l.*, are liable to be rated to the relief of the poor of the said parish of St. Bridget, otherwise St. Bride? If the Court should determine that the said last-mentioned wharf and premises, and the said buildings erected thereon, are liable by law to be rated to the relief of the poor of the said parish, the said rate is to be confirmed; but if they should be of opinion that the said last-mentioned premises are not liable to be so rated, the said rate is to be confirmed as to the sum of 60*l.* upon the annual rental or value of 800*l.*, and to be amended by striking out of the said rate the annual rental or value of 1200*l.*, and inserting instead thereof 800*l.*, and by striking out the sum of 90*l.* so assessed as aforesaid, and inserting instead thereof the sum of 60*l.*

*Brodrick* in support of the order of sessions. The Gas Light Company are rateable to the relief of the poor in respect of their occupation of the premises erected on the land embanked under the authority of the 7 G. 3, c. 37. The exemption which they claim rests upon the fifty-first section of that statute, which provided that the land embanked should be free from all *taxes and assessments*. Those words have never hitherto been considered as including poor-rates, for the occupiers of the land have always, from the time when it was embanked up to the time when the rate in question was made, paid the rate without dispute. And this is the more remarkable as several questions have at different times been raised as to the construction of the exemption. Thus, in *Williams v. Pritchard*, 4 T. R. 2, it was held that the land was exempt from land-tax: but the land-tax is imposed in a gross sum upon the district, and then subdivided amongst the different land owners in that district; and whether a particular spot be exempted from payment of its proportion or not, the sum raised for government by the district is still the same; and as this act was in the nature of a private act obtained by the corporation of the city of London, they might agree that this land should be exempt. *Eddington v. Bauman*, 4 T. R. 4, was a question on a private act as to payment of rates for amending sewers, lighting, paving, &c., and that necessarily followed the fate of the former case; for the statute imposing the rates provided that the amount to be paid by each occupier should be in proportion to the land-tax; premises exempt from the one were, therefore, necessarily held to be exempt from the other also. Then came the case of *Perchard v. Heywood*, 8 T. R. 486; where the Court held premises embanked under the 7 G. 3 liable to the house and window tax. It is true that in the statute imposing the tax there were strong words extending the liability to all premises not expressly exempted by that act; but Lord *Kenyon* said that without them he should have been of the same opinion. The only case, therefore, against the present rate is that respecting the land-tax; but it is distinguishable, that tax was imposed on the land, and the stat. 7 G. 3, c. 37, declares that this land shall be exempt from taxes; the poor-rate is imposed not on the land, but on the party in respect of his occupation of the premises; and a statute in its nature private, giving an exemption from a general burden attaching by law upon all persons, should be construed strictly. The local acts obtained by

this parish in the 39 G. 3 and 7 G. 4 for the better governing of the poor are, at all events, inconsistent with the existence of the exemption now claimed. They say that all inhabitants and occupiers shall be rated by an equal pound-rate, and are therefore at variance with the former act, if that gave the exemption. Now, according to the rule laid down in *Forster's case*, 11 Co. 62, these subsequent statutes being in the affirmative abrogate so much of the older statute as is inconsistent with them, and make the defendants liable to be rated for the property in question.

*Bolland*, contra, was stopped by the Court.

Lord TENTERDEN, C. J. The question in this case is, Whether certain property built on land embanked in pursuance of the statute 7 G. 3, c. 37, is to be exempt from poor-rates? That act contemplated an undertaking likely to be productive of public benefit, and certain inducements were held forth to the city to carry it into execution, and it provided, that the land so embanked should vest in certain persons "free from all taxes and assessments whatsoever," and the question is, Whether by those words the land is exempt from poor-rates? It has already been decided that it is exempt from the land-tax, and I know not upon what principle that decision could proceed, if it be not exempt from poor-rates also. It is said that an aggregate sum was imposed upon the district for land-tax, which was afterwards subdivided amongst the individuals having property there; and that it was immaterial to government how the division was made, provided the whole sum was raised. It was also said, that the act of parliament being in its nature private must be considered as a bargain between those who were parties to it, and that the city at large might in expectation of benefit from the embankment have consented that the land should not bear any part of the land-tax. But that argument is equally applicable to the present case. The poor may be substituted for the government: the whole sum to be raised for them is first calculated; and the amount to be raised remains the same whatever be the property in the district liable to contribute. Again, the embankment might be beneficial in a peculiar manner to the parish as well as to the city at large, and the inhabitants of the parish might, on that account, agree that it should be exempt from poor-rates. If the premises in question were exempt from this burden by the 7 G. 3, c. 37, I think that no alteration has been made by the 39 G. 3 and 7 G. 4; for the object of those statutes was only to provide a new mode of making and raising assessments for the relief of the poor, and not to bring in any new matter as the subject of assessment which was not so before they passed. They merely enumerate more specially the same descriptions of property that were mentioned more generally in the stat. 43 Eliz. The recent acts were passed alio intuitu, and we ought not in justice, as we are not bound by any rule of law, to make them applicable to any new thing. We were then pressed with the case of *Perchard v. Heywood*, where it was held that houses built on this land were liable to house and window tax. But that was a very different case. The object of the tax was to raise as large a sum as possible for the use of the public, and the amount raised would have been lessened had any houses been exempted, whereas the amount raised for land-tax or poor-rate would not; and I think that the decision as to the land-tax ought to guide our judgment on this occasion. One or two very recent cases are analogous to this. In *Chatfield v. Ruston*, 3 B. & C. 863, where a private inclosure act secured to the vicar of a parish a certain yearly sum of money "free and clear of all rates, taxes, and deductions whatsoever," it was held that he was not rateable in respect of that sum to the relief of the poor; and in *Mitchell v. Fordham*, 6 B. & C. 274, it was held that the words "free from all taxes and deductions whatsoever except

land-tax" gave the like exemption from poor-rates. For these reasons I think that the premises in question are exempt from poor-rate, and that the rate must be amended.

BAYLEY, J. I am of the same opinion. The cases cited by my Lord *Tenterden* are in point. Besides, the house and window tax was a new one imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation.

HOLROYD, J., concurred.

Rate to be amended.

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DONNE v. MARTYR.—p. 62.

A local act for enlarging, cleansing, paving, and lighting the streets, &c., in the city of London, authorized the commissioners to order a rate in the several wards of the city of London to be made by the aldermen and the major part of the common councilmen, upon all persons who inhabited, held, occupied, possessed, or enjoyed any land, house, shop, warehouse, &c., or other tenement or hereditament within the said several wards, and who by the laws then in being should be liable to be rated to the relief of the poor. By another clause, it was made lawful for the aldermen and the major part of the common councilmen of each ward, at a court of wardmote to be holden for the choice of ward officers, to return to the wardmote the names and places of abode of a competent number of substantial inhabitants of such ward, of whom so many as the alderman, &c., should think fit and direct, not exceeding half the number of persons so returned, should be chosen at the said wardmote to be collectors of the said rates and assessments for one year: Held, that the word *inhabitant*, in the latter clause, meant resident, and, therefore, that one of the several partners in a commercial establishment, who occupied a house for the purpose of his business in the ward, but who resided elsewhere, was not liable to serve the office of collector of the rates.

DEBT to recover a penalty of 50*l.* imposed by the 11 G. 3, c. 29, from the defendant, alleged to be a substantial inhabitant of the ward of Coleman Street, for not taking the oath required by the statute as collector for the said ward of a rate for paving, cleansing, and lighting the streets, and making, enlarging, &c., the common sewers within the city of London for the year ending 21st December, 1825. The declaration contained a count framed on a refusal to take the office. Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the London sittings before Michaelmas term, a verdict was found for one penalty of 50*l.*, subject to the opinion of this court on the following case:—

By the statute 11 G. 3, c. 29, entitled an act for consolidating and rendering more effectual the powers granted by several acts of parliament for making, enlarging, amending, and cleansing the vaults, drains, and sewers within the city of London, and liberties thereof, and for paving, cleansing, and lighting the streets, &c., and preventing and removing obstructions within the same, it is enacted, "That for the defraying the expense of paving, cleansing, and lighting the said streets, &c., and preventing annoyances therein, and of making, enlarging, &c., the common sewers, &c., within the city, one or more rates or assessments should (when the commissioners appointed by that act should think fit to order) be made, laid, and assessed in the several wards of the said city, by the aldermen or their deputies respectively, and the major part of the common councilmen of each ward, upon all and every person and persons who did or should inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenement or hereditament within the said several



wards, and who by the laws now in being should be liable to be rated towards the relief of the poor in the respective parishes where he, she, or they should respectively live or reside, for raising such competent sums as the commissioners should judge needful; so as such rates or assessments did not in any one year exceed certain sums in the pound of the yearly rents; such rates to be ascertained by the rates at which such respective lands, houses, shops, &c., should be from time to time assessed to the land-tax. And it was also enacted, that it should be lawful for the alderman or his deputy, with the major part of the common councilmen of each ward at the court of wardmote to be holden upon or near the feast-day of St. Thomas the Apostle for the choice of ward officers, to return to the said wardmote the names and places of abode of a competent number of substantial *inhabitants* of such ward, of whom so many as the said alderman, &c., should think fit and direct, not exceeding half the number of persons so returned, should be chosen and appointed at the said wardmote to be collectors of the said rates and assessments for one whole year from the said feast-day to the same feast-day then next following, and so yearly and from year to year. And it was also provided that every such collector who should be so chosen should at the wardmote at which he should be chosen, or within twenty-one days then next ensuing, before the alderman of the ward for which he should be chosen collector, or his deputy, take an oath in the said act mentioned (or, being one of the people called Quakers, make and subscribe an affirmation), for the true execution of the said office, which oath or affirmation should be administered by the alderman of each respective ward; and if any collector chosen in pursuance of the act should refuse or neglect to take the said oath, or, being one of the persons called Quakers, to make the said affirmation, or to take upon himself the said office, or, having taken upon himself the office, should refuse or neglect to serve or execute the same according to the true intent and meaning of that act, he should for every such refusal or neglect forfeit and pay the sum of 50*l*. There was also a proviso that nothing in the act should extend or oblige persons to serve the office who by the laws then in being were exempted from serving any ward office. The rate imposed by this statute is commonly called the consolidated rate. By the 4 G. 4, the penalty is made recoverable by an action of debt in any of his Majesty's courts of record in the name of any one of the clerks to the commissioners, and is made applicable to the purposes of the acts relating to this subject. The plaintiff at the time of the commencement of this action was one of such clerks. The defendant was, at the wardmote court of the ward of Coleman Street, held on St. Thomas's day, 1824, chosen and appointed in the manner required by the act collector of the consolidated rate for the said ward for the year ending on St. Thomas's day, 1825, having been duly nominated according to the act, and a rate having been duly made for that year; and he refused to take the oath required by the act (not being a Quaker) or to take upon himself the said office. The ground of his objection was, that he was not an inhabitant of the ward within the meaning of this act. He was in other respects liable to serve the office.

The defendant was and is a carpenter and builder, carrying on an extensive business in partnership with his brother, Mr. G. Martyr, and at the time of the defendant's being chosen to the office in question he was also in partnership with Mrs. Elizabeth Martyr, his mother. The defendant's only dwelling-house is at Greenwich, in Kent, where he with his family resides. Mrs. E. Martyr and Mr. G. Martyr also reside at Greenwich, having separate houses there. The business of the defendant and his partner is principally carried on at a very large yard and premises in Greenwich, but for the

convenience of business, they have workshops in several parts of London, as, for instance, one at Cotton Garden, and another at the Treasury. They likewise occupy premises consisting of a counting-house and workshops in Lothbury, in the ward of Coleman Street, London, being the ground floor of Founders' Hall; which premises the defendant and his partner, and previously to them the defendant's father, who was in the same business, have occupied for the last thirty years or thereabouts. For upwards of fifty years past no part of these premises has been used as a dwelling-house, and from the period when the defendant's father took the premises up to the present time they have been used as a counting-house and workshop only. There is no bedroom on the premises, and neither the defendant nor his partner nor any of their workmen or servants ever sleep, nor are any victuals ever cooked upon the premises, and at night, after the workmen have left, the premises are locked up. The defendant was and is rated for the said premises called Founders' Hall to the ward rates, and amongst others to the said consolidated rate, and to the parish rates. Neither the defendant nor his partner, nor the defendant's father, was ever till the present occasion called upon to serve the office in question, nor any parish offices in respect of such their occupancy of the premises in question; and the defendant is an inhabitant of Greenwich, and liable to serve all the parish offices there, and has for many years served as one of the governors of the poor. The question for the opinion of the Court was, Whether the defendant was a substantial inhabitant of the ward within the meaning of the act of parliament?

*Parke* for the plaintiff. The defendant is a substantial inhabitant of the ward within the meaning of the act of parliament, and therefore liable to serve the office of collector. The word inhabitant may mean either a resident or an occupier. In this statute it is used in the latter sense. In *Rex v. Poynder*, 1 B. & C. 178, it was held that the partners of a firm who had a dwelling-house in a particular parish in which none of them resided were householders within the meaning of the 43 Eliz. c. 2, and liable to serve the office of overseer. So persons under similar circumstances are liable to take a parish apprentice, although the statute of Elizabeth enacts that no person shall be bound to receive a parish apprentice unless he be an inhabitant and occupier in the parish where such child lives, *Rex v. Clapp*, 3 T. R. 107; *Rex v. Barwick*, 7 T. R. 33. The duties of an overseer of the poor-rates are analogous to those of a collector under this act of parliament.

*C. Law* for the defendant. It is manifest from the language used in the different sections of this act of parliament, that the word inhabitants in the clause authorizing the appointment of collectors of the rates means residents. The legislature by one clause imposes the rates upon all occupiers of lands, houses, tenements, and hereditaments. But in the clause by virtue of which the collectors are to be appointed it requires that there should be returned to the wardmote the names and places of abode of a competent number of substantial inhabitants of such ward, out of whom the collectors are to be chosen. The word inhabitants cannot there mean mere occupiers of property within the ward, who are described in the former sections as persons who are to contribute to the rate; and by a subsequent clause, if no collector is appointed at the wardmote, the commissioners are authorized under the act to appoint fit and able persons, being inhabitants of such ward, to collect the rate. In the 43 Eliz. c. 2, which enacts, "That competent sums shall be raised by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, &c. in the parish," the word *inhabitant* has been held to be confined to residents, *Rex v. North Curry*, 4 B. & C. 953. Besides the charge of serving the office of collector of the rates imposed by this statute is personal and not pecuniary, and, therefore, accord-

ing to *Rex v. Adlard*, 4 B. & C. 772, the word *inhabitants* must be confined in construction to residents.

LORD TENTERDEN, C. J. I think that the defendant is not a person liable to serve the office of collector of rates within the ward. The act authorizes the making of a rate "upon all and every person and persons who should inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenement or hereditament within the said several wards, and who, by the laws then in being, were or should be liable to be rated towards the relief of the poor in the respective parishes where he, she, or they should respectively live or reside." The object of the legislature was, that all proprietors and persons in possession of any real property should contribute to the fund to be raised for the purposes of the act. If it had been intended that all persons liable to be rated should also be liable to serve the office of collector of the rates, it would have been easy to require lists of the substantial persons liable to be rated to be returned to the court of wardmote. But in the clause providing for the appointment of the collectors, there is a material alteration in the language. It directs the names and places of abode of a competent number of substantial inhabitants to be returned to the wardmote, out of whom the collectors are to be chosen. So that the persons returned must be persons coming within the strict meaning of the word inhabitants, as contradistinguished from occupiers. The act requires the places of abode to be returned. It never could have been the intention of the legislature that a place of abode out of the ward should be returned. Founding my opinion on the particular language of this act of parliament, I think the defendant, not being a resident, was not liable to serve the office of collector.

BAYLEY, J. There is great weight in the argument drawn from the different language used in the two clauses of the act; the one which imposes the rate, and the other which authorizes the appointment of a collector. The legislature imposes a pecuniary charge upon all persons who inhabit, hold, occupy, possess, or enjoy any land, house, shop, &c.; but the personal charge of serving the office of collector is imposed upon substantial *inhabitants* only. The word inhabitant may mean either occupier or resident. The latter is the proper sense when it is used to denote persons on whom a personal (and not a pecuniary) charge is to be imposed, *Rex v. Adlard*, 4 B. & C. 772. Here a personal service is imposed. The duties are to be performed by personal attendance within the ward. It is more convenient to the inhabitants that the duties should be executed by a resident. For the collector, after demanding the rates, may require those who are to pay them to come to his house to pay them, and it would be a great inconvenience to the inhabitants of this parish to go to a house situate out of the parish. The convenience of the inhabitants, therefore, requires that the office should be executed by a resident. When we look at the nature of the duties to be performed, and the convenience of the inhabitants of the particular district, I think that the word inhabitant means resident; and that, consequently, the defendant was not liable to serve the office of collector.

HOLROYD and LITTLEDALE, Justices, concurred.

Judgment for defendant.

DOE, dem. LAWRIE and Another, v. DYEBALL. — p. 70.

Ejectment for a messuage and tenement. Judgment entered up generally for the plaintiff: Held, no ground for reversal on error.

ERROR to reverse a judgment for the plaintiff in ejectment, which was brought for a messuage and tenement.

*Chitty*, for the plaintiff in error, contended, that as ejectment does not lie for a tenement eo nomine, the judgment was erroneous, the damages not being now severable; and he cited *Goodtitle v. Otway*, 8 East, 357, where a motion having been made in arrest of judgment upon a similar ground, the difficulty was obviated by entering up judgment for the messuage only.

*Per Curiam*. It is a settled rule that if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts. That being so, there is no ground for reversing the judgment in question.

*Brodrick* for the defendant in error.

Judgment affirmed.

The KING v. The Inhabitants of GREAT BOLTON. — p. 71.

The 59 G. 3, c. 50, requires, inter alia, that in order to acquire a settlement by the renting of a tenement, it shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bona fide hired at and for 10*l.* a year at the least, for the term of one whole year, and that such house or building shall be held, and the land occupied, for the term of one whole year: Held, that a settlement was gained under this statute by a pauper hiring and holding for one year a distinct and separate dwelling-house, although part of the house was let to an under-tenant.

UPON an appeal against an order of two justices, whereby Lucy Hall, single woman, was removed from the township of Great Bolton in the county of Lancaster, to the township of Little Bolton in the same county, as the place of her settlement, derived from her mother Mary Hall, the sessions discharged the order, subject to the opinion of this court on the following case:—

The pauper's mother, Mary Hall, being a widow, went to reside in Little Bolton in May, 1823, where she hired a house consisting of six rooms and a cellar, and being a separate and distinct dwelling-house, for a year, and from year to year, at the annual rent of 11*l.*; and she continued to hold such house, and actually paid the aforesaid rent for the same, for the space of two years and upwards. Before she went to live in the house, but after she had hired it, and put some of her furniture into it, she underlet to one J. Clough the cellar under the house at 1*s.* 6*d.* per week, and he occupied the cellar during the whole of Mary Hall's tenancy. The cellar was let unfurnished, and Clough occupied nothing but the cellar. The cellar communicated with the street by an outer door, of which Clough kept the key; and at the time Mary Hall took the house the cellar communicated with the room above in the house, by means of a step-ladder and a trap-door, but when she went to live in the house she took away the step-ladder, which she placed in one of the higher rooms of the house, and shut the trap-door, expressly for the purpose of preventing any communication between the cellar and the rest of the house. The trap-door was not fastened, except that the furniture of the house was placed upon it, as upon other parts of the room floor. The trap-door was never used by the cellar tenant or by Mary

Hall. When the cellar was underlet to Clough there was no fire-grate in it, and soon afterwards Clough applied to Mary Hall for a grate to be put up in the cellar. Mary Hall furnished the grate at her own expense, and it remained there until she left the house, when she sold the grate to Clough, who paid her for it. The pauper lived with her mother, as part of her family, in this house during the whole of her tenancy. The question for the opinion of this court was, whether, under the circumstances stated, the pauper's mother, on whose settlement that of the pauper depended, gained a settlement in Little Bolton under the 59 G. 3, c. 50.

*Coltman* in support of the order of sessions. No settlement was gained by the mother of the pauper in Little Bolton, because she did not hold a distinct dwelling-house for a year; she let the cellar. The statute 59 G. 3, c. 50, requires, *inter alia*, that in order to gain a settlement by the renting of a tenement, the tenement shall consist of a house or building within the parish, being a separate or distinct dwelling-house or building, or of land, or of both; and that *such* dwelling-house or building shall be held, and such land occupied, and the rent for the same actually paid, for the term of one whole year. Here there was not a separate and distinct dwelling-house held during the year, for the trap-door was closed for the purpose of preventing the communication between the cellar and the other part of the house. In *Rex v. North Collingham*, 1 B. & C. 578, Lord Tenterden, C. J., says, "If it had been stated that the key was delivered to the lodger for the express purpose of preventing the communication between the different departments, there would be more weight in the argument." Here a burglary committed in the cellar could not have been laid in an indictment to have been committed in the dwelling-house of the pauper's mother.

*Courtenay*, *contra*. A settlement was gained by the mother of the pauper in Little Bolton. The act of parliament gives a settlement on certain conditions. Every condition required by the act of parliament has been complied with. The mother hired a tenement, being a distinct and separate dwelling-house. She underlet part but continued tenant of the whole house. The house or building was held by her for one whole year, and the rent paid for that time. *Rex v. Tonbridge*, 6 B. & C. 88, is an authority to show, that, as to houses and buildings, before the statute 6 G. 4, c. 57, it was sufficient if the tenure subsisted for the year, though as to lands, they must have been occupied. The underletting part of a house or building will not, therefore, prevent a settlement.

Lord TENTERDEN, C. J. The safest course in this case is to give effect to the particular words of the enacting clause. Where the legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas. The words are, "that the house or building shall be held and the *land occupied*." Here the house was held for one whole year, and the pauper's mother gained a settlement in Little Bolton. The order of sessions must therefore be quashed.

Order of sessions quashed.

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The KING v. The Inhabitants of GREAT SHEEPY in the County of Leicester.—p. 74.

The parish officers of A. bound a pauper apprentice to his grandfather, who was described as a butcher. Indentures were executed with the sanction of two justices. The grandfather in fact did not carry on the trade of a butcher, but he and the mother colluded together, and fraudulently imposed him on the justices and the parish officers as a proper master for the pauper: Held, that there having been no fraud in the parish officers the pauper gained a settlement by serving under this indenture.

UPON appeal against an order of two justices, whereby E. Burton, his wife, and children, were removed from the parish of Great Barford in the county of Oxford, to the parish of Great Sheepy in the county of Leicester, the sessions confirmed the order, subject to the opinion of this Court on the following case :—

The pauper was bound apprentice by the churchwardens and overseers of the poor of Great Sheepy, by a parish indenture of the 28th of April, 1807 (the pauper being then a poor child of the parish, aged seven years or thereabouts), to George Wilkins of Deddington, in the county of Oxford, butcher; with him to dwell and serve from the day of the date of the indenture, until the apprentice should accomplish his full age of twenty-one years. The indenture was in the usual form, and was duly executed by all the parties thereto, and in the margin thereof *the magistrates duly signified their consent*. The father of the pauper, whose last place of settlement was Great Sheepy, had died four or five years before the date of the indenture, and thereupon his widow had gone with the pauper to reside with her father, G. Wilkins, at Deddington, the parish of Great Sheepy relieving the widow till the pauper was seven years old. The parish then proposed to the mother to put the pauper out apprentice to Measham cotton works, and told her that they should no longer relieve her, unless the pauper was apprenticed. Upon this the mother requested the officers to bind the pauper to her father, George Wilkins, in order that the boy might not be removed from her. The parish officers consulted the rector (who was himself a magistrate), as to the propriety of acceding to this request; and having received his sanction, they and the mother and Wilkins met together, and went before the justices, without the pauper, for the purpose of binding him. The justices allowed the binding, and the indenture was executed by all parties, and a premium of 6*l.* was paid to Wilkins by the parish officers. There was nothing in the appearance of Wilkins to excite any suspicion that he was an improper person; and there was not any fraud or collusion on the part of the magistrates, or of the parish officers of the appellant parish. The pauper continued to dwell with Wilkins in the parish of Deddington, after the execution of the indenture, running errands, and doing whatever he was bid to do, till after he was nine years of age, when he left his grandfather, and never afterwards returned to him; but after the binding he continued to go to school by day, as he had gone before, except in the holidays; and he never was informed, nor did he know that he had been bound apprentice, neither did he ever receive any instruction in the trade of a butcher. Indeed, though G. Wilkins, the master, had been a butcher, it did not appear that he had ever killed any cattle after the binding, and he was a man in needy circumstances. Upon the above facts the sessions founded their judgment, that the mother of the pauper and the grandfather had colluded together, and fraudulently imposed the grandfather upon the parish of Great Sheepy as a proper master for the child; and on the ground of this fraud alone held that no settlement was gained under the indenture, though they acquitted the parish officers of Great Sheepy of all participation in the fraud, and found that they acted *bonâ fide* in the matter.

G. R. Cross and Abbott in support of the order of sessions. The sessions have found that the mother of the pauper and the grandfather fraudulently imposed the latter upon the parish as a proper master for the child. Such a fraud avoids the indenture *ab initio*, and consequently no settlement was gained.

Bligh (and Chilton was with him) *contrâ*, was stopped by the Court.

Lord TENTERDEN, C. J. The sessions have found that a fraud was committed, but not by the parish officers. It appears that an imposition was

practised on them by the master. If it were competent after a great lapse of time to inquire into the fact, whether fraud had been committed in the binding out of an apprentice by any of the parties to the indentures, a vast number of settlements might be disturbed, and great expense incurred. The law, by requiring in the case of a parish apprentice that the master shall be approved of by two justices, has endeavoured to provide that there shall be a proper master, and that everything shall be done correctly; and where the justices have sanctioned a binding, and there has been no fraud in the parish officers, the safest course for us is to say, that service under such a binding confers a settlement, although the master may have imposed upon the justices. The court of quarter sessions have mistaken the effect of the fraud found by them. Even supposing that they were right in finding such fraud, still it will not prevent a settlement.

Order of sessions quashed.

### The KING v. The Inhabitants of MAULDEN.

An order of justices made under the 5 G. 4, c. 71, stated, "that the justices, after due examination had on oath, *having adjudged* the legal place of settlement of a pauper lunatic, confined in a lunatic asylum, to be in M., did thereby require the churchwardens and overseers of M. to pay to the treasurer of the lunatic asylum 10l. 16s. due for twenty-four weeks' maintenance, &c., being at the rate of 9s. per week, and to pay the same weekly sum during so long a time as the pauper should remain therein." The parish of M. appealed against this order, and in their notice of appeal described it as an order of settlement and maintenance: Held, that as the parish of M. had treated this as the order of settlement, it must be presumed that there was no other order, and, therefore, the words, "*having adjudged*," must be understood as words of present adjudication, and that the order was good in this respect: Held, secondly, that so much of the order as was retrospective was bad, but that it was good for the residue.

This was an appeal against an order of two justices, which was in the following words: "To the churchwardens and overseers of the poor of the parish of Maulden, in the county of Bedford, we, G. C. and T. B., clerks, two of his Majesty's justices of the peace acting in and for the said county, by virtue of the powers vested in us by an act of the 5 G. 4, entitled 'An Act to amend several acts for the better care and maintenance of lunatics, being paupers or criminals, in England,' and by desire of the visiting justices of the General Lunatic Asylum at Bedford, in the said county, after due examination had on oath, *having adjudged* the legal place of settlement of Elizabeth Cole, now a pauper lunatic confined in the said lunatic asylum at Bedford, to be in the parish of Maulden, do hereby by virtue of the powers vested in us by an act of the 48 G. 3, entitled 'An Act for the better care and maintenance of lunatics, being paupers or criminals, in England,' require you, the churchwardens and overseers of the poor of the said parish of Maulden, to pay to the treasurer of the said asylum the sum of 10l. 16s., being the amount due for twenty-four weeks' maintenance, medicine, and clothing of the said Elizabeth Cole, at the rate of 9s. per week, as fixed upon by the visiting justices of the said asylum, from the 2d November, 1826, to the 19th April, 1827, the day of making this our order; and we do further order and direct you, the churchwardens and overseers of the poor of the parish of Maulden, to pay, from the date hereof, the sum of 9s. per week, or such other weekly sum, to the treasurer of the said asylum for the time being, as shall from time to time be fixed upon by the visiting justices of the asylum as a fit rate of maintenance, medicine, and clothing of the said Elizabeth Cole, during so long time as Elizabeth Cole shall be and remain in the asylum." It appeared by the notice of appeal that the appellants appealed

against the order as an order of settlement and maintenance. The sessions having confirmed this order, *Bolland*, in last Hilary term, obtained a rule to show cause why the original order, and the order of sessions, should not be severally quashed for their insufficiency, upon the ground, first, that it did not contain any distinct adjudication that the pauper was settled in Maulden, and, secondly, that it was retrospective.

*The Solicitor-General, Hawkins, and Kelly*, now showed cause. It appears sufficiently on the face of the order that the justices thereby adjudged the pauper to be settled in Maulden. The adjudication is informal, being by recital, yet, as it may be collected from the notice of appeal that there was no other order, the appellants having in their notice treated this order as the order of settlement, it must be taken to be a sufficient adjudication of the pauper's place of settlement. As to the other point, assuming that the order is retrospective, it is only bad as to the by-gone time, and is good as to the residence.

*Bolland* contrâ. There is not any distinct adjudication on the face of the order, that the pauper's last place of settlement was in Maulden. The statute 5 G. 4, c. 71, s. 3, enacts, that in any case in which a lunatic, whose settlement, by reason of his lunacy, cannot be ascertained, shall be, by the order of two justices, confined in any lunatic asylum, it shall be lawful for any two justices acting for the county in which such asylum shall be situate to examine into the legal settlement of such lunatic, and if satisfactory evidence can be obtained as to such settlement, it shall be lawful for such justices to adjudge the last legal settlement of such lunatic to be in such parish or place as may appear to them to be the place of such legal settlement. There must, therefore, be an adjudication by the justices as to the place of the pauper's last legal settlement. The order of sessions contains no such adjudication, but a mere recital of such an adjudication having been made. But, secondly, the order is at all events bad for that part which relates to the by-gone time. A retrospective order is bad, because the effect of it is to throw a burden incurred at a former period upon inhabitants who ought not to bear it. The justices have no express power to make such a retrospective order, and it is unnecessary for them to have such power, because by the 48 G. 3, c. 96, s. 17, the justices are authorized, at the time when the pauper is sent to the lunatic asylum, to make an order upon the overseers of the poor to pay to the treasurer of such asylum such a weekly sum as shall be deemed fit by the visiting justices for the maintenance of the pauper.

Lord TENTERDEN, C. J. I think that on reading the order, and the notice of appeal, we must assume that there was but one order, and one proceeding. The appellants by the notice of appeal treat the order in question as an order of settlement. That being so, the first question is, Whether there appears on the face of the order a sufficient adjudication by the justices that the pauper's last place of settlement was in Maulden? The justices say in their order "that they, by virtue of the powers vested in them by the statute 5 G. 4, after due examination had on oath, *having* adjudged the legal place of settlement of the pauper to be in Maulden." Now it is conceded, that if the justices had said "that they *do* adjudge," it would have been sufficient. As the appellants, however, by their notice of appeal treat the order in question as an order of settlement, we must assume that there was no other order made; and if that be so, we cannot understand the words "having adjudged" to have been used in any other sense than that which would have belonged to the words "do adjudge." The next question is, Is the order good altogether? It is objected to as being retrospective. The effect of a retrospective order is to bring on in-



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*Bolland* contrà. There is not any distinct adjudication on the face of the order, that the pauper's last place of settlement was in Maulden. The statute 5 G. 4, c. 71, s. 3, enacts, that in any case in which a lunatic, whose settlement, by reason of his lunacy, cannot be ascertained, shall be, by the order of two justices, confined in any lunatic asylum, it shall be lawful for any two justices acting for the county in which such asylum shall be situate to examine into the legal settlement of such lunatic, and if satisfactory evidence can be obtained as to such settlement, it shall be lawful for such justices to adjudge the last legal settlement of such lunatic to be in such parish or place as may appear to them to be the place of such legal settlement. There must, therefore, be an adjudication by the justices as to the place of the pauper's last legal settlement. The order of sessions contains no such adjudication, but a mere recital of such an adjudication having been made. But, secondly, the order is at all events bad for that part which relates to the by-gone time. A retrospective order is bad, because the effect of it is to throw a burden incurred at a former period upon inhabitants who ought not to bear it. The justices have no express power to make such a retrospective order, and it is unnecessary for them to have such power, because by the 48 G. 3, c. 96, s. 17, the justices are authorized, at the time when the pauper is sent to the lunatic asylum, to make an order upon the overseers of the poor to pay to the treasurer of such asylum such a weekly sum as shall be deemed fit by the visiting justices for the maintenance of the pauper.

Lord TENTERDEN, C. J. I think that on reading the order, and the notice of appeal, we must assume that there was but one order, and one proceeding. The appellants by the notice of appeal treat the order in question as an order of settlement. That being so, the first question is, Whether there appears on the face of the order a sufficient adjudication by the justices that the pauper's last place of settlement was in Maulden? The justices say in their order "that they, by virtue of the powers vested in them by the statute 5 G. 4, after due examination had on oath, *having* adjudged the legal place of settlement of the pauper to be in Maulden." Now it is conceded, that if the justices had said "that they *do* adjudge," it would have been sufficient. As the appellants, however, by their notice of appeal treat the order in question as an order of settlement, we must assume that there was no other order made; and if that be so, we cannot understand the words "having adjudged" to have been used in any other sense than that which would have belonged to the words "do adjudge." The next question is, Is the order good altogether? It is objected to as being retrospective. The effect of a retrospective order is to bring on in-

habitants who ought not to bear it a charge incurred during a former period. It is quite unnecessary that the justices should have the power of making a retrospective order; for an order for the payment of a weekly maintenance might have been made as soon as the pauper was placed in the asylum; and as there is not any necessity that the justices should have such power, and as no such power is expressly reserved to them, I am of opinion that they had it not. This order, therefore, so far as it relates to the bygone time is bad, but good as to the residue.

Rule absolute for quashing the order as to the 10*l.* 16*s.*; discharged as to the residue.

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**The KING v. The Inhabitants of COMBE.—p. 82.**

The father of a pauper was about to put him out to service, when it was suggested to him by A., a carpenter, that it would be better for the pauper to learn his (A.'s) trade, instead of going to service; and A. afterwards hired the pauper to learn his trade, and to do any other work, as well as that of a carpenter. The pauper went to A. and served him for five years, living during that time with his parents, who provided him with victuals and part of his clothing, the remainder being provided by A. The pauper did any work his master ordered him to do, and at the end of that time he agreed to work for the master as a journeyman at weekly wages. The sessions having found that this was a defective contract of apprenticeship, and not a contract of hiring, this Court confirmed the order of sessions.

UPON an appeal against an order of two justices, whereby J. Davies the younger, his wife, and children, were removed from the township of Presteign, in the county of Radnor, to the township of Combe, in the county of Hereford; the sessions considering that the contract between the pauper and one Cole was a defective contract of apprenticeship, and not one of hiring as a servant, and that its sole object was the instruction of the pauper in the trade of a carpenter, confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, J. Davies, had a derivative settlement from his father in the township of Combe. J. Davies the elder, the pauper's father, sixteen years ago, when the pauper was about fourteen years of age, was about to put him out to service, and took him to Presteign, with the intention of hiring him, but did not hire him. Shortly afterwards, one James Cole, a carpenter, residing in Presteign (the brother of the pauper's mother), suggested that it was better for the pauper to go and learn his (Cole's) trade of a carpenter, instead of going to service. At length Cole hired the pauper from his mother to learn his trade. The pauper was to do any other work as well as that of a carpenter. Cole was to find the pauper part of his food and part of his clothing, but he was to lodge at his father's house. In pursuance of this contract the pauper went to Cole and served him for five years, lodging in the township of Presteign with his parents, who provided part of his clothing and victuals. During the whole five years the pauper did any work Cole put him to do, as well as working at the trade of a carpenter. In the second or third year after the pauper had entered upon his service, a conversation took place between the parties about indentures being drawn to bind pauper to Cole until the age of twenty-one, in order to exempt the pauper from the militia. The indenture was to be drawn to bind the pauper till he was twenty-one, but it was understood that he was to be free at the end of five years, to be computed from the time of the original contract: no indenture was drawn, nor anything afterwards said upon the subject. At the expiration of the five years (that being understood by the parties to be the termination of the original contract, whatever was the nature of it),

the pauper agreed to work with his uncle Cole as a journeyman carpenter, under a weekly hiring, and to be paid weekly wages, the pauper boarding and clothing himself; and he was to be at liberty to go away at the end of any week; and he continued with Cole under these terms (except upon one or two occasions varying the amount of the weekly wages) for nine or ten years.

*Campbell* in support of the order of sessions. The question is, Whether a settlement was gained by hiring and service in Presteign? The sessions, by confirming the order of removal to Combe, have negatived any contract of hiring, and unless their decision be manifestly wrong, the Court will not interfere. But the decision of the sessions is right. Here there was no contract of hiring. The principle to be collected from the authorities relating to contracts of this nature is, that if the object of the master be to teach, it is to be considered as a contract of apprenticeship, but if his object be to get a servant, then it is to be considered a contract of hiring, although the service is to be coupled with learning a trade. The cases of *Rex v. Little Bolton*, Cald. 367, 2 Bott. 222, pl. 280; *Rex v. Eccleston*, 2 East, 298, and *Rex v. Burbach*, 1 M. & S. 370, will be relied upon. The first of these cases has been considered anomalous, and is distinguishable. The object of the master was to get a servant, and the decision proceeded on the ground since overruled, that the relation of master and apprentice could only be created by express words. In *Rex v. Hitcham*, Burr. S. C. 489, the essence of the contract was hiring. In *Rex v. Burbach* it is said by *Bayley, J.*, that apprenticeship was not contemplated. *Rex v. St. Margaret, King's Lynn*, 6 B. & C. 97, is expressly in point. There a master shoemaker made a proposal to a poor woman, to take her son to learn his business; the son was to serve him for four years, to board and lodge with his mother, and to have half what he earned. No indentures were executed on account of the poverty of the mother; and it was held that this was a defective contract of apprenticeship, and not a contract of hiring, and, consequently, that the pauper did not gain any settlement by hiring under it.

*Taunton*, contra. It is true that the intention of the parties must govern the construction of the contract, but that must be ascertained from the contract itself; and if that be ambiguous, the acts done must be taken into consideration. The case states that Cole hired the pauper to learn his trade, and do any other work. The learning of the trade was only incidental to, and not an essential part of, the contract. Now it is established by the authorities, that if a party be hired to learn a trade, and do any other work, that is a contract of hiring. A settlement was therefore gained by the pauper at the end of the first year's service. Then, during the whole five years the pauper did any work Cole put him to. The subsequent statement as to indentures shows that apprenticeship was not contemplated in the first instance. Besides, a special purpose is stated for which the indentures were to be executed. *Rex v. Little Bolton*, Cald. 367, has always been considered a leading case on this subject, and never has been overruled. In *Rex v. St. Margaret, King's Lynn*, 6 B. & C., 97, there were circumstances to show that apprenticeship was contemplated; for it was stated that there would have been indentures at the commencement of the service, but for the poverty of the mother. In *Rex v. Burbach*, 1 M. & S. 370, the sessions found that there was a contract of hiring and service, and this Court thought them justified in so doing.

*Cur. adv. vult. (a)*

Lord TENTERDEN, C. J., now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows:—

(a) This case was argued on a former day in this term.

The question in this case is, Whether the pauper served in Presteign as an apprentice, or as a yearly servant? It is clearly established by the authorities, that if an apprenticeship was only contemplated by the parties, and there was an imperfect contract of apprenticeship, the service will give no settlement. The case of the *King v. St. Margaret, King's Lynn*, was relied upon in support of the order of sessions. There a master shoemaker made a proposal to a poor woman to take her son to learn his business. The son was to serve him for four years, to board and lodge with his mother, and to have half what he earned. No indentures were executed on account of the poverty of the mother; and it was held that that was a defective contract of apprenticeship, and not a contract of hiring; and, consequently, that the pauper did not gain any settlement by serving under it. The judgment in that case delivered by my Brother *Holroyd* appears to me to apply to this. He there says that he was of opinion "that the relation of master and apprentice was contemplated by the parties, or at least that there was not sufficient ground to warrant the Court in concluding that the relation of master and servant was contemplated by the parties." I think that, in this case, there was not sufficient ground to warrant the sessions in concluding that a contract of hiring was contemplated by the parties. My Brother *Holroyd* proceeds: "It appears that application was made by the master, who was a shoemaker, to the mother of the pauper, and he offered, if she would agree to his proposal, to take her son, then a boy, to learn his business. That was the subject of the application, and it was for the mother to consider whether she would consent to the proposal made to her." In this case it appears that the father of the pauper was about to put the pauper out to service, and that Cole, a carpenter, suggested that it was better for the pauper to learn his (Cole's) trade, instead of going to service. This was the proposal made by Cole, and it was for his father to consider whether he would consent to it. If the father had then put the son out to Cole, it would clearly have been in the character of an apprentice, and not in that of a hired servant. The case then states, that Cole hired the pauper from his mother, *to learn his trade*. The object, therefore, of the master was, that the pauper should learn his trade, or, in other words, that he should serve him as an apprentice, and not as a servant. That being so, I think, to use the words of my Brother *Holroyd*, in *Rex v. St. Margaret, King's Lynn*, there was not sufficient in this case to warrant the sessions in finding that the relation of master and servant subsisted between these parties. The fair inference from the facts stated is, that there was not in this case any contract of hiring, but a defective contract of apprenticeship. No settlement, therefore, was gained in Presteign, and the order of sessions must be affirmed.

Order of sessions affirmed.

The KING v. The Inhabitants of SHIPTON, in the County of SALOP.—p. 88.

The master of a parish apprentice not having work sufficient for him, proposed to hire to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, and agreed with her to work there for a twelve-month for his meat and drink. He worked for her for four years and four months. During the first two years he received from her meat and drink. During the third and fourth he received wages: Held, first, that no settlement was gained by the service with his sister, the service not being under the indentures: Held, secondly, that there had been a putting away of the apprentice without the consent of the justices, within the meaning of the statute of 56 G. 3, c. 139, s. 9, and that the pauper did not by his service with the sister gain any settlement by hiring and service.

Upon an appeal against an order of two magistrates, dated the 14th of May, 1827, whereby William Partridge and his wife were removed from the parish of Dudley, in the county of Worcester, to the parish of Shipton, in the county of Salop; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, W. Partridge, at the age of thirteen years, was under indentures, bearing date the 3d of September, 1816, put out an apprentice for seven years, by the officers of the parish of Stanton Long, in the county of Salop, with the consent of two magistrates in the usual manner, to John Taylor, who occupied a farm in that parish. After the pauper had been some months at his master's farm, Taylor not having sufficient work for him, asked him if he would go over to a farm called the Moorhouse, in the parish of Shipton, to drive the plough. The pauper said he had no objection, and immediately packed up his clothes and went accordingly. The Moorhouse was in the occupation of a Mrs. Corser, the sister of Taylor, whose husband was a lunatic, and incapable of superintending the management of his farm. Taylor accordingly about once a fortnight went over from his residence at Stanton Long to the Moorhouse, a distance of a mile, and gave his advice and opinion to his sister, respecting the proper management of her farming affairs. He also gave orders to her servants, but never gave any orders to the pauper after he had been sent to the Moorhouse as before mentioned. Taylor never told the pauper William that he might hire himself, or make any engagement with Mrs. Corser, but retained possession of the indenture of apprenticeship, and produced it in court on the trial of appeal. No agreement or bargain was ever made between Taylor and his sister, respecting the services of the pauper. On the arrival of the pauper at the Moorhouse, Mrs. Corser asked him if he would stay and drive the plough for his meat and drink for a twelvemonth? he replied that he would, and she sent him to the field to drive the plough. For his services at the Moorhouse for the first and second years the pauper was not paid any money, but was found in clothing (except a pair of shoes and some stockings), and in meat and drink by Mrs. Corser. At the end of the second year he hired himself for a year to Mrs. Corser for 5*l.*, and served that year, and received the full amount of his wages. When that period had expired he hired himself again for a year at 6*l.*, and received that sum at the completion of the year. During the time that the pauper was in the service of Mrs. Corser, which was four years and four months, he never received any orders from Taylor, nor did he ever return to Taylor's farm after he first quitted it, as before stated. No assignment of the indenture was made, nor was the consent of any magistrate obtained for placing the pauper William with Mrs. Corser. When he had been for two years at Mrs. Corser's, Taylor became insolvent and quitted his farm, after which he ceased

to have anything to do with the Moorhouse, and saw no more of the pauper. Before Taylor's insolvency, and whilst the pauper worked at the Moorhouse, Taylor, on the application of the pauper's mother, furnished him with some shoes, and on another occasion supplied him with wool to make stockings for him; he also employed a surgeon to attend him whilst labouring under a complaint, and paid his bill. When the pauper left the Moorhouse the term of his apprenticeship had not expired. The question for the consideration of the Court was, Whether this apprentice had not been put away and dismissed from the service of his master, within the meaning of section 9 of 56 G. 3, c. 139, which came into operation on the 1st of October, 1816, so that he could not obtain a settlement in Shipton by means of his service there? or whether the service in Shipton was by law a service under the indenture of apprenticeship, so as to confer a settlement in that parish?

*F. Pollock and Wallinger*, in support of the order of sessions. A settlement was gained in Shipton by apprenticeship. The service in that parish to Mrs. Corser was by consent of the first master, and, therefore, was a good service under the indenture. Secondly, the gaining of a settlement was not prevented by the 56 G. 3, c. 139, s. 9. The 32 G. 2, c. 57, s. 7, only prohibited the gaining of a settlement by the assignment of an apprentice without the consent of justices. The word assignment imports a transfer to the apprentice for the whole term, *Crusoe v. Bugby*, 3 Wils. 234. The 56 G. 3, c. 139, s. 9, prohibits the master from putting away or transferring an apprentice without the sanction of the justices, and prevents the apprentice from gaining a settlement by service under the indenture after such putting away; and the tenth section imposes a penalty upon any master for so doing. Now as the statute imposes a penalty, it must be construed strictly, and so construing it, there was no putting away of the apprentice by Taylor in this case. The putting away imports an act done by the master. He merely sent him to a farm in the occupation of his sister, Mrs. Corser, which he (Taylor) superintended. He provided the pauper with wearing apparel and medical attendance when required. He neither gave permission to the pauper to hire himself to, or make any engagement with Mrs. Corser, nor intimated any intention of dismissing the apprentice from his service for any definite period of time. The fact of his having provided the pauper with clothes shows clearly that he was considered by Taylor as in his service.

*Campbell*, contra. First, independently of the statute 56 G. 3, c. 139, s. 9, the pauper gained no settlement by the service in Shipton, because the service was not referable to the indenture of apprenticeship, but to a contract of hiring. *Rex v. Whitchurch*, 1 B. & C. 574, is expressly in point. Assuming, however, that the service in Shipton was a service under the indenture, the pauper was prevented from gaining a settlement by the provisions of the 56 G. 3, c. 139, s. 9. The former statute of the 32 G. 3, c. 57, s. 7, had prohibited masters from assigning parish apprentices without the sanction of two magistrates. The ninth section of the 56 G. 3, c. 139, recites, that it might be expedient that those to whom parish apprentices were bound or assigned should be empowered to *place out* or assign over such apprentice to others, and that it was proper that such placing out or assignment should in all instances be under the inspection and control of the magistrates. The object of the legislature was, that no parish apprentice should be placed out without the consent of justices. The statute then proceeds to enact, "that it shall not be lawful for any master to put away or transfer his apprentice to any other, or in any way discharge or dismiss him from his service, without such consent; and that no settlement shall be gained by any service of such apprentice after such putting away, unless

such service shall have been performed under the sanction of such consent as aforesaid." The fair meaning of that is, that he should not place out or put away such apprentice from his service for any period whatever without the consent of the justice. Here the master not only permitted the pauper to go into the service of another, but to continue in such service for four years. That was a putting away of the apprentice from his service during that period.

LORD TENTERDEN, C. J. Upon both grounds I think that the justices were wrong in the conclusion to which they came in this case. First, independently of the provisions of the 56 G. 3, c. 139, I think that no settlement was gained in this case. In order to gain a settlement by apprenticeship, there must be a continued service under the indenture. If, during the term of the apprenticeship, the apprentice hires himself to a stranger to the indenture, the service is not referable to the indenture, but to the contract of hiring, and, consequently, no settlement is gained by apprenticeship. Here it appears from the facts stated in the case that the pauper hired himself to Mrs. Corser. He might, therefore, have gained a settlement by hiring and service if he had not been an apprentice. The service was not under the indenture, but under the contract of hiring.

I also think that no settlement was gained, because there was, in this case, a putting away of the apprentice within the meaning of the 56 G. 3, c. 139, s. 9. The 32 G. 3, c. 57, s. 7, recites, that it frequently happened that persons were compellable under the act of the 9 & 10 W. 3 to take a greater number of parish apprentices than it was convenient for them to maintain or employ in their own families, and they were, therefore, forced to *place out* or assign over such apprentices to other persons, and that it was proper that such assignment should be legally made under the inspection and control of the magistrates, as well for the benefit of the apprentice as that the original master might be discharged from his covenants in respect of such apprentice; and that it was fit that the person to whom such assignment should be made, and also the apprentice, should be subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices; and it then enacts, "that it shall be lawful for the master of any such parish apprentice, by indorsement on the indenture, &c., with the consent of two justices, to assign such apprentice to any person willing to take such apprentice for the residue of the term mentioned in such indenture." Notwithstanding this statute, it was discovered that many grievances had arisen from the binding of poor children as apprentices by parish officers to improper persons, whereby the parish officers and the parents of such children were deprived of the opportunity of knowing the manner in which such children were treated; and also from the permission given to apprentices by the persons to whom such apprentices had been bound, to serve others without a formal assignment, whereby the discretion required by the statute to be exercised by magistrates in placing out apprentices to suitable persons was frequently rendered of no avail. Those mischiefs are provided for by the statute 56 G. 3, c. 139, s. 9, which recites, "that it was expedient that those to whom parish apprentices were bound or assigned should be empowered to *place out* or assign over such apprentice to others, and that it was proper that such *placing out* or assignment should in all instances be under the inspection and control of the magistrates, and that it was fit that the person to whom such putting out or assignment should be made, and the apprentice, should be subject to the ordinary jurisdiction of justices of the peace, and that it was inexpedient that any master or mistress should in any way discharge or dis-



miss from his or her service any parish apprentice without the consent of such justices;" and it then enacts, "that it shall not be lawful for any master to put away or transfer any parish apprentice to any other, or *in any way* to discharge or dismiss from his or her service any parish apprentice without such consent of justices as was directed by the 32 G. 3, c. 57, and that no settlement shall be gained by any service of such apprentice after such putting away or transfer, unless such service shall have been performed under the sanction of such consent as aforesaid." Here Taylor, the first master, not having sufficient work for the apprentice, proposed to him to go and work at a farm in the occupation of Mrs. Corser, where he worked for her for four years and four months, with the assent of Taylor. I think that was a putting away of the apprentice, without the consent of the justices, within the words of the ninth section of this statute, and, consequently, that no settlement was gained after the putting away of the pauper to Mrs. Corser. The order of sessions must, therefore, be quashed.

BAYLEY, J. *Rex v. Whitchurch*, 1 B. & C. 574, is expressly in point to show that no settlement was gained by apprenticeship in this case, on the ground that the service in Shipton was not referable to the indenture, but to the contract of hiring. I think, also, that the pauper gained no settlement in Shipton, because there was a putting away of the apprentice within the meaning of the 56 G. 3, c. 139, s. 9. The object of the legislature was to protect parish apprentices, who are unable to protect themselves, and to place them under the protection of the magistrates. We ought, therefore, to adopt such a construction as will best effectuate the intention of the legislature. The 32 G. 3, c. 57, s. 7, prohibited masters from assigning parish apprentices without the consent of the justices. In the recital of that section, the words "*place out or assign*" occur, but, in the enacting part, the assignment alone is prohibited. But the 56 G. 3, c. 139, s. 9, recites, "that it is expedient that the *placing out* or assignment of parish apprentices should, in all instances, be under the inspection and control of the magistrates," and enacts, "that it shall not be lawful for any justices to put away or transfer any parish apprentice without such consent, and that no settlement shall be gained by any service of such apprentice, after such putting away or transfer, unless such service shall be performed under the sanction of such consent as aforesaid." An *assignment* imports a transfer of the services of the apprentice for the residue of his term. But an apprentice may be said to be *placed out* when the master consents to the apprentice serving another individual, so as to become subject to the control of that other. Here it is evident that the legislature intended to prohibit the placing out, without consent of the justices, as well as the assignment. I think that in this case the master placed out the apprentice to Mrs. Corser, or put him away, and consequently, that the service, after such putting away without consent, gave no settlement.

Order of sessions quashed.

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The KING v. The Inhabitants of STOURBRIDGE. — p. 96.

The mother of a pauper stated, that about twenty-four years ago she received money from the parish officers at S., to put her son out apprentice, and that she accordingly

put him out ; that the indenture was signed by her, the pauper, the master, and by a witness ; that she gave it to the wife of a market-gardener, who attended the market of S., to take to the overseers of the parish of S. ; that the market-gardener and his wife were both dead, the latter having survived her husband ; that she did not know whether the market-gardener's wife had left any will, but had heard that she had. Evidence was then given that search had been made in the parish-chest of S. for the indenture, and that it could not be found : Held, that as it was the duty of the overseers, if the indenture had come into their possession, to deposit it in the parish-chest, the presumption was, that it was lost or destroyed, and, therefore, that secondary evidence of the execution and contents of the indenture was admissible.

UPON an appeal against an order of two justices, bearing date the 27th day of April, 1827, whereby G. Layton, his wife, and four children, were removed from the parish of Bromsgrave, in the county of Worcester, to the township of Stourbridge in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case : —

The respondent parish established a derivative settlement of the pauper in the appellant township by relief given to his mother. The mother of the pauper, being examined on the part of the appellants, stated, that about twenty-four years ago she received some money from the overseers of Stourbridge to put her son out apprentice, and that she accordingly put the pauper, at the age of seven years, apprentice to one Clay, of the parish of Bromsgrave, who was her brother-in-law ; that the indenture was signed by her, by the pauper G. Layton, by the master, and by the man who had filled it up ; that she gave the indenture to Nanny Badger to take to Stourbridge to the overseers who had given her the money to pay for the stamp for it ; that it was directed to the overseers of Stourbridge ; that Nanny Badger's husband was a market-gardener, and used to attend Stourbridge market ; that sometimes he, and sometimes his wife, went to market, and the indenture was to be carried to the overseers by either the husband or the wife when they went to market ; that both Nanny Badger and her husband were since dead, but that she had survived her husband ; that she did not know whether Nanny Badger had left any will, but she had heard that she had. The appellants further proved by John Mosely, an overseer of Stourbridge, that he had searched diligently in the chest where the papers of the township are kept for the indenture of apprenticeship, but had not been able to find it ; and that he had applied to the executor of W. Badger, the husband of Nanny Badger, who had informed him that the indenture had never come to his hands, and that he was certain that no such paper was in W. Badger's possession when he died. Under these circumstances the appellants proposed to give secondary evidence of the due execution and contents of the indenture. But this evidence was objected to on the part of the respondents, and disallowed by the court of quarter sessions, on the ground that sufficient evidence had not been given of the loss of the indenture. The question for the opinion of this court was, whether, under the circumstances stated, secondary evidence ought to have been admitted of the execution and contents of the indenture.

*Shutt*, in support of the order of sessions. The secondary evidence was properly rejected, because sufficient evidence of the loss of the indenture was not given. This was not a useless instrument, for it would be required whenever it became necessary to prove the pauper's settlement. The parish officers, therefore, had an interest in preserving it. Applica-

tion ought to have been made to the overseer to whom the indenture was sent. There was no evidence to show that he was dead. The mother was the witness of the appellants. It was for them to establish their case, and to show that the indenture was lost. The parish chest was the proper depository; but when it was not found there, the inference is, that it never had been there. It might have been delivered to the overseer to whom it had been sent, and might therefore be in his possession.

*M Mahon*, contra. The indenture was directed to the overseers generally, not to any particular overseer. The duty of the overseers was to deposit it in the parish chest, and it is to be presumed that they would do their duty in that respect, and it was not found there. It may, therefore, fairly be presumed that it never was delivered to the overseers, and that it has been destroyed or lost.

Lord TENTERDEN, C. J. I think that under the circumstances of this case there was reasonable evidence of the loss or destruction of the indenture, and that the secondary evidence ought to have been received. If it had been handed over to the overseers it would have been placed in the parish chest, for it was their duty to place it there. Not having been found there, the natural presumption is, that it is lost.

BAYLEY, J. If the indenture ever found its way into the parish chest, which was the proper place of custody if it had been delivered to the parish officers, it would have been there. Not being there, the presumption is, that it is lost or destroyed.

Order of sessions quashed.

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The KING v. The Inhabitants of BARHAM. — p. 99.

A pauper on the 6th of April, 1823, hired a house for a year at the rent of 12*l.* per annum, in the parish of A. In January, 1824, he became chargeable to that parish, and was, by an order of justices, removed to the parish of B. There was no appeal against the order of removal. The pauper returned on the same day to his house in the parish of A., and continued to occupy it until the expiration of the year for which he had hired it, and paid the rent for the year: Held, that as the pauper had hired and held the house for a year, and paid the rent for that period, all the requisites of the statute 59 G. 3, c. 50, had been complied with, and that he gained a settlement in the parish of A. by renting a tenement.

UPON an appeal against an order of two justices, whereby Henry Welch, his wife and children, were removed from the parish of Barham, in the county of Kent, to the parish of St. Mary the Virgin, Dover, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper Henry Welch, on the 6th of April, 1823, hired a house of one Redman in the parish of St. Mary the Virgin, in Dover, by the year, of the yearly value and at the rent of 12*l.* per annum, payable monthly. In January, 1824, the pauper, who was a butcher, became chargeable to the parish of St. Mary the Virgin, and was, together with his family, directed to be removed, by an order of two justices, from that parish to the parish of Barham. The pauper *alone* was removed, and Pope, one of the then overseers of the parish of Barham, received him, and gave him 2*s.* 6*d.*, and directed him to return to Dover. The pauper returned the same day to his house in Dover, and continued to occupy it, under the original contract, until Michaelmas, 1824, when, in

consequence of certain threats of Mr. Hubbard, an overseer of the poor of the parish of St. Mary the Virgin, Dover, to send him to gaol for coming back to Dover, he agreed with the landlord of the house to take it by the week, at the rent of 5s. weekly. At Michaelmas, 1824, the pauper owed some rent; and no final settlement of the rent took place till July, 1825, when the landlord having put a distress into the house, the pauper paid the rent, and left the house, which he had occupied first under the yearly and then under the weekly hiring uninterruptedly since the 6th of April, 1823. The pauper during his occupancy paid his rent on account as it suited him, partly in money and partly in meat, but had no regular settlement till he left the house. The parish of Barham did not appeal against the order of the justices, by virtue of which the pauper was removed in the month of January, 1824, from the parish of St. Mary the Virgin, Dover, to the parish of Barham. The court of quarter sessions were of opinion that the pauper had not gained a settlement in the parish of St. Mary the Virgin, Dover, by such an occupation of Redman's house. The case was argued on a former day in this term by

*Bolland* and *D. Pollock* in support of the order of sessions. The order of removal to Barham was made in January, 1824. The pauper at that time had not held or occupied the house rented by him in Dover for the term of one whole year. Unless, therefore, the occupation previous to that order of removal can be connected with that which was subsequent to it, the pauper did not hold for a year so as to gain a settlement. All the acts necessary to confer a settlement must be done before the order of removal. Here, when the pauper first became chargeable, he had not held the house for the term of one whole year, so as to gain a settlement by the 59 G. 3, c. 50. He was guilty of an offence against the law by returning to Dover after the first order of removal. *Rex v. Fillongley*, 2 T. R. 709, certainly established that an order of removal does not put an end to a contract respecting the renting of a tenement; and it was there decided, that a pauper returning after the execution of an order of removal to a tenement held under such a contract gained a settlement by residing forty days after the removal. But the statute 59 G. 3, c. 50, requires that the tenement, if it consist of a house, must be held for the term of one whole year. It is clear, therefore, that in this case the pauper could not gain any settlement by the holding subsequent to the order of removal. And *Rex v. The Inhabitants of Kenilworth*, 2 T. R. 598, is expressly in point to show, that after an order of removal not appealed from, a new settlement can only be gained by some act or cause altogether subsequent to the order of removal. There a pauper in service at A., under a hiring for a year, was removed to B. and did not appeal, but returned in a few days to his master at A., was received by him, served out the year, and was paid his full wages; it was held that he gained no settlement in A. *Buller, J.*, in that case says, "The pauper returned, after the order of removal, to the parish of Birmingham, where he served a month; but that could not gain him a settlement there, for the act subsequent to the order of removal, by which he was to gain a settlement, should be complete in itself."

*Brodrick* and *Thesiger*, contra. This case is distinguishable from *Rex v. Kenilworth*, 2 T. R. 598. There the contract was a contract of hiring, and the justices who made the order of removal had the power of putting an end to such a contract; and the contract having been determined, there was an interruption of the service, and, consequently, the service before

the order of removal would not connect with that which was subsequent to it. But the magistrates in this case had no power to put an end to a contract between a landlord and tenant respecting the taking of a tenement. Independently of the order of removal, it is clear that a settlement was gained in Dover. For all the things required by the 59 G. 3, c. 50, have been done. The pauper hired the house, paid the rent, and held it for the term of one whole year. If there had been an appeal against the order of removal, on the hearing of the appeal no settlement in Dover could have been set up, because the question would have been, What was the place of settlement of the pauper at the time when the order was made? Then, if the order of removal had no effect on the contract between the landlord and tenant, there was a holding and occupation for the term of one whole year under one and the same yearly hiring. But even if it were otherwise, *Rex v. Stow*, 4 B. & C. 87, has decided, that an occupation under a defective hiring will connect with an occupation under a yearly hiring; and if continued for the term of a year, will confer a settlement.

*Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court; and after stating the facts of the case, proceeded as follows:—The question depends on the statute 59 G. 3, c. 50, which enacts, “that no person shall acquire a settlement by or by reason of his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building being a separate and distinct dwelling-house or building bonâ fide hired by such person at and for the sum of 10*l.* a year at the least for the term of one whole year; nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same.” The language of this enactment is very peculiar. No person is to acquire a settlement by reason of dwelling forty days in any tenement, unless such tenement shall consist of a house (as it does in the present case) bonâ fide hired by such person at the sum of 10*l.* a year for the term of one whole year, nor unless such house shall be held, and the rent for the same actually paid, for the term of one whole year at the least. It should seem, therefore, that if a pauper resides for forty days upon a tenement, and the other requisites of the act have been complied with, he gains a settlement. Now in this case the pauper resided in the house more than forty days both before and after the removal, and all that the act requires in other respects was complied with. The house was taken for a year, and held for upwards of that period, and the rent was actually paid for the term of one whole year. It has been contended that the effect of the order of removal was to prevent the gaining of any settlement unless all that the act requires has been complied with after that order was made. If the effect of the order of removal had been to compel the pauper to abandon his tenement, it would make a difference. But he was absent from his home not even a day, and his family were never removed at all. It was admitted in the argument that *Rex v. Fillongley*, 2 T. R. 709, had decided that the removal did not put an end to the contract between the landlord and tenant; and, under all the circumstances, we think it safer to say that a settlement was gained in Dover under the 59 G. 3, c. 50, by the residence before and after the removal. It was insisted that the return of the pauper after the removal was an offence against the law; but since the 35 G. 3, c. 101, this may admit of considerable doubt. Before that act a person likely to become chargeable was removable, and if he returned after the removal, he returned in the same condition; but

as that act renders a person irremovable, unless actually chargeable, he may, after his removal, return with the means of subsistence, and it is difficult to say that by so returning he commits an offence. Our decision may, perhaps, in this particular case, operate to defeat the object of the 59 G. 3; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature. The order of sessions must, therefore, be quashed, and the original order of removal confirmed. Order of sessions quashed.

**BOLLAND and Others, Assignees of W. MARSH and Others, Bankrupts, and also of H. FAUNTLEROY, a Bankrupt, v. J. NASH.**—p. 105.

A kept cash with M. and Co., bankers, and accepted a bill drawn by one of the partners in the house of M. and Co., and indorsed by that partner to M. and Co., who discounted it, and afterwards indorsed it for value to S. Before the bill became due, M. and Co. became bankrupts, having funds in the hands of S., more than sufficient to pay the bill, and having in their hands money belonging to A. When the bill became due S. presented it for payment to A., who having refused payment, S. paid himself the amount out of the funds of M. and Co. remaining in his hands, and delivered the bill to their assignees: Held, in an action brought by the assignees against A., as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and A., and that the latter was entitled to set off against the sum due to the bankrupts on the bill, the debt due to him from M. and Co. at the time of their bankruptcy.

**ASSUMPSIT** on two bills of exchange; one for 3000*l.*, dated the 17th of July, 1824, payable three months after date, drawn by H. Fauntleroy on the defendant, and accepted by him, and indorsed by the drawer to the bankrupts; the other bill for 1000*l.* of the same date, payable also three months after date, and drawn, accepted, and indorsed in like manner. Plea, general issue. At the trial before Lord *Tenterden*, C. J., at the Middlesex sittings after Trinity term, 1827, a verdict was found for the plaintiffs for 2760*l.* 11*s.*, subject to the following case:—

The bills for 3000*l.* and 1000*l.* were drawn and accepted as stated in the declaration. The bankrupts Marsh and Co., who were the defendant's bankers, discounted the bills for the defendant on the 17th of July, 1824, and the drawer indorsed the bills in blank, and delivered them to the bankrupts, and afterwards, and before Marsh and Co. became bankrupts, and before the bills became due, Messrs. Martin, Stone, and Stone discounted the bills for the bankrupts, who indorsed the bills in blank, and delivered them to Martin and Co. Marsh and Co. having become bankrupts on the 16th of September, 1824, commissions of bankruptcy were duly issued against them, and the plaintiffs were duly appointed assignees. At the time of the bankruptcy the defendant had two accounts with the bankrupts, one in his own name, the other in the names of Nash and Lyon. On the former of these he had overdrawn to the amount of 1478*l.* 11*s.* 6*d.*, independently of the outstanding bills on which the action was brought. On the latter account there was a balance in his favour to the amount of 8830*l.* It was admitted at the trial that for the purpose of mutual credit, or set-off, both accounts were to be considered as the accounts of the bankrupts with the defendant solely. But at the time of the bankruptcy, the bankrupts also held other bills accepted by the defendant to the amount of 5000*l.* At the time of the bankruptcy Martin and Co. still held the bills declared on, and they then

had in their hands money of Marsh and Co. to the full amount of the bills, which did not become due till afterwards, viz. on the 20th of October. When they fell due Martin and Co. duly presented the bills for payment, but the defendant refused to pay them; whereupon Martin and Co. immediately paid themselves the amount of the bills, without interest, out of the money of Marsh and Co. in their lands; and the defendant being then requested by the assignees to pay to them the amount of the bills, insisted upon deducting the sum of 2351*l.* 8*s.* 6*d.*, as the amount due to him on the balance of the two accounts, and paid them, on the 2d of April, 1825, 1648*l.* 11*s.* 6*d.*, being the difference between the said sum of 2351*l.* 8*s.* 6*d.* and the amount of the bills, 4000*l.* The questions for the opinion of the Court were, first, Whether the defendant could set off the 2351*l.* 8*s.* 6*d.* against the amount of the bills? and, secondly, Whether any and what interest can be recovered in this action? (a)

*Chitty* for the plaintiffs. The question is, Whether there was a mutual credit between the bankrupts and the defendant before they became bankrupts, so as to entitle him to deduct from the sum claimed by the plaintiffs the money due to him from the bankrupts, at the time of the act of bankruptcy? Here the defendant gave credit to the bankrupts, by trusting them with his money. But the bankrupts, at the time of the act of bankruptcy, gave no credit to the defendant. In *Dickson v. Evans*, 6 T. R. 57, Lord *Kenyon* states, that the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of the situation of one of the parties. Now at the time of the bankruptcy there was nothing due from the defendant to the bankrupts, for the bills were then in the hands of Martin, Stone, and Co. There was no credit, therefore, at that time given by the bankrupts to the defendant, but the credit was given by Martin, Stone, and Co. In *Ex parte Hale*, 3 Ves. jun. 304, the acceptor of a bill becoming bankrupt, the indorser before the bankruptcy took up the bill; and it was held that he was entitled to prove under the commission, but could not set it off against a debt due from him to the estate. In *Ex parte Burton*, 1 Rose, B. C. 320, Burton was the drawer, and De Franco and Corea were the acceptors of a bill for 200*l.*, which Burton had discounted with his bankers, Kensington and Co. They became bankrupts before the maturity of the bill, having then in their hands a balance upon Burton's account to the amount of 310*l.* The bill came to the hands of Kensington and Co.'s assignees. The Lord Chancellor held, that there was no mutual credit between Kensington and Co. and Burton, and refused to allow the latter to set off the sum due to him by Kensington and Co.

*F. Pollock*, contra. The defendant gave credit to the bankrupts, by depositing his money in their hands. The bankrupts gave credit to the defendant, by taking his bills for 3000*l.* and 1000*l.* The defendant at that moment became their debtor, and they became his creditors, though it was debitum in præsentì solvendum in futuro. The bankrupts trusted the defendant to the amount of the sum secured by the bills; and though they afterwards parted with the bills they still trusted him, and believed that he would, when called upon, pay them. Assuming, however, that

(a) It was afterwards agreed that the second question should be settled out of court.

the bankrupts by parting with the bills ceased to give credit to the defendant, still, when they were returned to their assignees, they were remitted to the original rights of the bankrupts. The credit in the interim was only suspended, not destroyed. In *Ex parte Hale*, 3 Ves. jun. 304, no credit was given. In *Ex parte Boyle*, Cooke's B. L. 562, Shepherd, the bankrupt, was the solicitor of Lord Cork, and received and paid moneys for him. Lord Cork drew four notes for 981*l.* 0*s.* 3*d.* Shepherd agreed to indemnify Lord Cork. Lord Cork paid one of these notes, being of the amount of 273*l.* 6*s.*, before the bankruptcy, and two afterwards. There was a debt due to Shepherd for business done to the amount of 365*l.* 4*s.* 6*d.* The Lord Chancellor was of opinion that Lord Cork's administrator was entitled to set off against the debt due to Shepherd the payments after the bankruptcy, and ordered that the plaintiff should be at liberty to prove for 273*l.* 6*s.*

Lord TENTERDEN, C. J. I am of opinion that the defendant is entitled to set off against the sum due to the plaintiffs on the bills the sum of 2351*l.* 8*s.* 6*d.*, on the ground that there was before the bankruptcy a mutual credit between the bankrupts and the defendant within the meaning of the statute 5 G. 2, c. 30. The twenty-eighth section of that statute enacts, "that where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt, or any other person, at any time *before such person became bankrupt*, the commissioners or the assignees may state the account between them, and one debt may be set off against another, and the balance only shall be paid." The question, therefore, is, Whether in this case there was a mutual credit between Nash and Marsh and Co. before the bankruptcy of the latter? The bills were drawn by one of the partners in the house of Marsh and Co., and accepted by Nash. They were drawn for the convenience of the latter. Marsh and Co. gave him credit as the acceptor of the bills. He had money in their hands; he therefore gave them credit. There was a mutual credit originally constituted. If there was once a mutual credit constituted between these parties, was it in the power of Marsh and Co. by any act of their own to put an end to that mutual credit, so as to deprive the defendant of his right to set off any debt due from them to him against the sum claimed by them or their assignees from him as acceptor of those bills? It cannot be denied that if Marsh and Co. had always kept the bills in their own hands there would have been a continuing mutual credit between them and the defendant, and that the latter, therefore, would have been entitled to deduct the sum due to him from Marsh and Co. at the time of their bankruptcy from the sum claimed by their assignees from him as the acceptor of the bills. I think that Marsh and Co., the holders of the bills, could not by their own act put an end to the mutual credit originally constituted between them and the defendant, so as to deprive the latter of his right to set off any debt due from them to him against the sum claimed by them, or (in the event of their bankruptcy) by their assignees from him as the acceptor of those bills. This case is distinguishable from the two cases cited. In *Ex parte Hale*, 3 Ves. jun. 304, it does not appear that Hale was the drawer of the bill; no credit, therefore, was originally constituted between him and the bankrupt. In *Ex parte Burton*, 1 Rose, B. C. 320, the bill was drawn by Burton and accepted by De Franco and Corea. Burton was one of the petitioners, and he was the person who ought to have paid that bill as between him



and De Franco and Corea. But here Nash was the person who ought to have paid the bills. Upon the whole, I am of opinion that the defendant was entitled to set off the sum of 2351*l.* against the amount of the bills. The judgment of the Court must therefore be for the defendant.

BAYLEY, J. This is a clear case of mutual credit. Was Nash a debtor to Marsh and Co. before their bankruptcy; or had they given him credit before that time? Nash wants money on his bills. Marsh and Co. advance him money. The relation of lender and borrower was thereby constituted between them. Marsh and Co. might have maintained an action for money had and received to their use. Nash gives credit to Marsh and Co. for the money in their hands. Here, therefore, there was a mutual credit between the bankrupts and the defendant, without the intervention of any third person. In *Ex parte Hale*, 3 Ves. jun. 304, there was no immediate connection between the indorser of the bill and the bankrupt. There was no credit given by the acceptor to the indorser. At no period, as between them, was there a debitum in præsentî solvendum in futuro. In *Ex parte Burton*, 1 Rose, B. C. 320, it was impossible to come to any other conclusion than that which was come to on the principle of set-off. Who were the debtors on the bill in that case? De Franco and Corea: they were the acceptors of the bill. Burton was the drawer; and having money in Kensington and Co.'s house when they failed, endeavoured by the petition to transfer his right against Kensington and Co. to De Franco and Corea. That case, therefore, is distinguishable from the present.

HOLROYD, J., concurred.

LITTLEDALE, J. There was a mutual credit originally constituted between the defendant and the bankrupts. They afterwards pay the bills away, but they are returned to them by Martin, Stone, and Co. If they had never parted with the possession of the bills, there would have been a continuing mutual credit. There may have been a temporary suspension of the mutual credit; but it revived when the bills again came into the hands of the bankrupts or their assignees. Judgment for defendant.

## The KING v. The Bishop of ELY.—p. 112.

Mandamus granted to compel a bishop to allow inspection of his register of presentations and institutions to a living in his diocese, by a person claiming the right of patronage, although the bishop also claimed that right.

A RULE had been granted, calling upon the Bishop of Ely to show cause why a mandamus should not issue, commanding him to allow — Finch, clerk, to inspect his registry of presentations and institutions to the living of Cottenham, in the diocese of Ely, from the time of the dissolution of monasteries, and to take copies of them. It appeared by the affidavits that Finch and the Bishop of Ely were adverse claimants of the right of patronage of this benefice.

*Storks*, Serjt. and *Patteson* showed cause. In the *Mayor of Southampton v. Graves*, 8 T. R. 590, the court refused to compel a corporation aggregate to allow an inspection of their books; and Lord *Kenyon* said there was no difference in that respect between corporations aggregate and sole. And again in *May v. Gwynne*, 4 B. & A. 301, the Court would not compel the plaintiff, who was a vestry clerk, to exhibit to the defendant, a parishioner, certain parish papers in his possession: but it must be admitted that the court intimated that they would have granted the rule had the documents been wanted for any ordinary parish purpose. So, also, in *Cox v. Copping*, 1 Ld. Raym. 337, where a parson claimed adversely to the parish, the Court would not compel the parish to grant him an inspection of their books. Now the Bishop is not obliged to keep a register of presentations and institutions; and, therefore, if he does it, the book is of a private nature for his own information. The presentations themselves are the proper evidence; the copies kept by the bishop would not be evidence for him, although they might be evidence against him, being kept by himself. The courts have never compelled the production of such an instrument. If, however, they would be evidence on either side, the cases of *Cox v. Copping*, and *Turner v. Gethin*, Vin. Abr. Ev. (F b) pl. 11, are strong authorities against the motion, the dispute being a private one between two individuals as to the right of patronage of a benefice.

Sir *J. Scarlett*, contra. In Gibson's Codex, 858, it is stated to be the duty of the ordinary to make in his public register an entry of all institutions for several purposes; and, amongst others, that the title of the patron may not suffer by the want of proper evidence upon whose presentation it was that institution was given. The very object of the entry, therefore, is to furnish evidence for the patron.

Lord TENTERDEN, C. J. I am of opinion that this rule must be made absolute. The books of a corporation are kept for the use of the body at large, or that of the individual members, and not for the use of strangers; so also are parish books; but a bishop's register of institutions is kept for the use of all persons claiming title to livings in his diocese. It, therefore, differs from the others, and is of a public nature; and although the Bishop himself may claim the right of patronage, that is no reason why another claimant should not have access to the register.

BAYLEY, J. I think that the circumstance of the bishop's claiming title makes the case stronger in favour of this application; for he should not, in order to gain a private benefit, be allowed to withhold public documents.

Rule absolute.

## The KING v. EVERETT.—p. 114.

An information stated that certain goods were about to be imported into Great Britain from parts beyond the seas, in respect of which certain duties would be payable ; and that one R. H., at the time of committing the offence thereafter mentioned, was a person employed in the service of the customs, and that it was the duty of him, as such person so employed in the service of the customs, to arrest and detain all such goods as should be imported, which, upon such importation, would become forfeited to the King, by virtue of any act of parliament relating to the customs, and which would be liable to be seized ; and that the defendant, well knowing, &c., unlawfully and corruptly solicited R. H., being such person so employed in the service of the customs, when certain goods should be imported, which, upon importation, would be liable to be seized or forfeited, to forbear to arrest and detain the same, &c. : Held, that inasmuch as it was not the duty of every person employed in the service of the customs to arrest and detain goods which would be liable to be seized as forfeited, this count was bad, for want of showing that R. H. was a person whose duty it was to arrest and detain such goods.

INFORMATION for unlawfully soliciting a custom-house officer to neglect his duty. The third count stated that heretofore, to wit, on the 6th day of October, in the 8th G. 4, at Holt, in the county of Norfolk, certain goods and merchandises, to wit, spirituous liquors, were about to be imported and brought into Great Britain, to wit, at, &c., from parts beyond the seas, in respect of which goods and merchandises certain duties of customs would then and there be due and payable to our said lord the King, and that at the time of committing the several offences thereafter mentioned, Richard Hooper was a person employed in the service of the customs of our said lord the King, to wit, at, &c. ; that it was the duty of Richard Hooper, as such person so employed in the service of the customs of our said lord the King as aforesaid, to arrest and detain all such goods and merchandises as should, within his knowledge, be imported and brought into Great Britain, which, upon such importation thereof, would become forfeited to our said lord the King by virtue of any acts of parliament relative to his Majesty's customs then in force, and which would then and there be liable to be seized as forfeited as aforesaid, in order that such goods and merchandises might be dealt with according to law ; and that the defendant, well knowing the premises, but having no regard for the laws and statutes of this realm, and unlawfully devising and intending to cheat and defraud our said lord the King in his said revenue of the customs, afterwards on, &c., with force and arms at, &c., did unlawfully and corruptly solicit him, Richard Hooper, being such person so employed in the service of the customs of our lord the King as aforesaid, when certain goods and merchandises should be imported and brought into this kingdom, which, upon such importation thereof, as aforesaid, would become forfeited to our said lord the King, by virtue of certain acts of parliament relative to his Majesty's customs then in force, and which would be liable to be seized as forfeited as aforesaid, unlawfully and con-

trary to the duty of him Hooper as such person so employed in the service of the customs of our said lord the King, to forbear to arrest and detain the said last-mentioned goods and merchandises, in order that the same might not be dealt with according to law, whereby our said lord the King might and would be then and there defrauded in his said revenue of the customs, in contempt, &c. At the Spring assizes for the county of Norfolk, 1828, the defendant was found guilty on the third count only, and *Kelly* on a former day in this term obtained a rule nisi for arresting the judgment, upon the ground that it did not appear in that count that Hooper was a person whose duty it was to make seizures of goods liable to forfeiture. On moving for the rule, he contended (the allegation being merely that Hooper was a person employed in the service of the customs) that the law did not cast upon all persons in the service of the customs the duty of making seizures; and that although the 6 G. 4, c. 108, s. 34, enacted that goods liable to forfeiture might be seized by any officer of the army, navy, or marines duly authorized and on full pay, or officers of customs or excise, or any person having authority to seize from the commissioners of his Majesty's customs or excise; the count did not show that Hooper was a person coming within any of the three classes described in that section. It ought to have shown that Hooper was a person whose duty it was to make seizures.

The *Solicitor-General* and *Shepherd* now showed cause. It sufficiently appears that Hooper was a person having authority from the commissioners of customs to seize goods, and, therefore, within the third class of persons mentioned in the thirty-fourth section; for the allegation is, that he was a person in the service of the customs, and that it was his duty to make seizures. Now, a person in the service of the customs, whose duty it is to make seizures, must be intended to have authority from the commissioners to seize. Besides, Hooper also comes within the second class of persons described in the thirty-fourth section, because he is shown to be an officer of the customs; for by the eighth section of 6 G. 4, c. 106, "every person employed on any duty or service relating to the customs, by the orders of the commissioners of his Majesty's customs, (whether previously or subsequently expressed,) shall be deemed to be the officer of the customs for that duty or service."

LORD TENTERDEN, C. J. The objection must prevail. The count alleges that R. Hooper was a person employed in the service of the customs of our lord the King, and that it was his duty, as such person so employed in the service of the customs of our said lord the King, to arrest and detain all such goods and merchandises as should within his knowledge be imported into Great Britain, which upon such importation would become forfeited to our said lord the King by virtue of any acts of parliament, &c. The allegation that Hooper was a person employed in the service of the customs, is an allegation of fact. The allegation that it was his duty to seize goods which upon importation were forfeited, is an allegation of matter of law. That being so, the fact from which that duty arose ought to have been stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it is clearly not the duty of every such person; as, for instance, it is not the duty of a porter employed in the service of the customs to seize such goods. The case of *Max v. Roberts*, 12 East, 89, is in point; there

the count stated "that the defendants, being owners of a ship at Liverpool bound on a voyage from thence to Waterford, the plaintiff shipped goods on board to be carried upon the said voyage by the defendants, and to be delivered at W. to the plaintiff's assigns; and thereupon the plaintiff insured the goods at and from L. to W., and then averred that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from L. to W. without deviation; and alleged a breach of such duty by their causing the ship to deviate from the course of that voyage, after which she was lost, with the goods; and the plaintiff, by reason of such deviation, lost his goods, and the benefit of his policy, &c.;" and it was held that the count could not be sustained. Lord *Ellenborough*, in delivering the judgment of the Court in that case, says, "The first count of the declaration alleges a shipment by the plaintiff of goods on board a vessel of which the defendants are stated to be owners; but it does not proceed to state that such goods were delivered to or received by the defendants, or that the defendants, in any manner, ever had notice of the fact of such shipment. So that in this count there is not only a want of any words importing a promise by the one party to the other, but there is also an entire absence of all circumstances or facts from which any promise or agreement could be implied, or duty inferred between them in respect to such goods." The ground of the decision in that case was, that there was not any fact alleged from which the law would imply any duty in the defendant with respect to the goods. Now, in this case, there is not any fact stated in consequence of which the law cast on Hooper the duty of making seizures. By the 6 G. 4, c. 108, s. 34, that duty belongs to an officer of the army, navy, or marines, or officers of the excise or customs, or a person having authority from the commissioners of the customs or excise. It is not averred that Hooper was a person coming within any of these classes. Neither is it averred that he was a person employed on the duty or service of making this seizure, so as to make him an officer of the customs for that duty or service within the statute 6 G. 4, c. 106, s. 8. The rule for arresting the judgment must be made absolute.

Rule absolute.

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SAMUEL v. The ROYAL EXCHANGE Assurance Company. —  
p. 119.

A vessel insured from Sierra Leone to London, and upon which the insurance was to endure until she had been moored in good safety twenty-four hours, arrived in the evening of the 18th of February, and the captain, having orders to take her into the King's Dock at Deptford, moored her near the dock-gates. On the following morning he was informed at the dock, that no order for his admittance had been received; but that, if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the Navy Board on the 21st; but, on account of the ice, the ship could not be moved until the 27th, and then, in warping her towards the dock, a rope broke, she grounded, and was totally lost. The jury found that the vessel remained at her moorings from the 18th to the 27th of February on account of the ice, and not for want of an order to enter the dock. Held, that upon this finding, the plaintiff was entitled to recover, for that the place where the vessel was moored not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay.

COVENANT on a policy of assurance at and from Sierra Leone to London, "on ship, called *Salmon River*, and freight, to begin at Sierra Leone, and endure upon the ship until she shall have arrived at London, and hath there moored at anchor twenty-four hours in good safety, and upon the goods until the same be there discharged and safely landed." Averment, that whilst the vessel was proceeding on her voyage, and before she had been moored at London twenty-four hours, she grounded, and was wrecked and totally lost. Second count for a loss by barratry of the master. Plea, the general issue, according to the statute, that the corporation have not broken their covenants, or any of them. At the trial, before Lord *Tenterden*, C. J., at the London sittings after Trinity term, 1827, it appeared that the *Salmon River* sailed from Sierra Leone for the port of London on the 3d of December, 1826, laden with teak, and chartered to one *Lennox*, who had entered into a contract with the Navy Board to supply them with a cargo of teak, to arrive before the end of that month. On the 2d of February, 1827, the vessel having received damage in a gale of wind, the captain put into Dover, and remained there under repair until the 13th of February. During that interval he came to London for orders, and *Lennox* directed him to take the ship into the King's Dock, at Deptford, and deliver her cargo there. In the afternoon of Sunday, the 18th of February, the vessel arrived at Deptford, and was moored alongside a King's ship, near the dock gates. On the following morning, the captain made inquiries at the dock-yard respecting the admission of his ship, and was informed that no bills of lading had arrived, and there were no orders to admit her; but that she could not, under any circumstances, be then admitted on account of the quantity of ice in the river. The captain then went to London, and, after some negotiation with *Lennox*, the Navy Board consented to take the cargo, which they at first refused to do, because it arrived out of time, and on the 21st of February the chief officer of the dock received orders to admit the vessel. From the 18th until the 25th of February the quantity of ice in the river continually increased, but on that day the frost gave way, and on the 27th the *Salmon River* was cast off from her moorings, and warped towards the dock. In consequence of a rope breaking, she went ashore near the dock-gates, and was totally lost. It appeared also that many vessels laden with timber discharged their cargoes at the place where the *Salmon River* had been moored. Upon this evidence, it was contended for the defendants, either that the place where the *Salmon River* was moored must be considered as the place of her destination, in which case she had been in good safety for twenty-four hours before the loss, or, that if it were not, the captain had remained there an unreasonable time, and consequently the underwriters were discharged. The Lord Chief Justice left it to the jury to say whether the *Salmon River* remained lashed to the King's ship waiting for an order to be admitted into the King's Dock, or whether she remained there because, from the 18th to the 27th of February, she could not have removed elsewhere for the purpose of delivering her cargo, had the owner wished it, and directed them, if they thought she remained waiting for the order, to find for the defendants, otherwise for the plaintiff. The jury having found a verdict for the plaintiff, the Attorney-General, in Michaelmas term, obtained a rule nisi for entering a nonsuit, against which

*Campbell, Pollock*, and *Joshua Evans* showed cause. The real question in this case is, what was the destination of the vessel? She could not be considered as moored twenty-four hours in good safety, until she had been for that space of time moored at the place where her cargo was to be discharged. Suppose the captain, in consequence of adverse winds, had anchored at Gravesend, and remained there twenty-four hours, it is clear that the underwriters would not have been discharged, although Gravesend is in the port of London. The only circumstance upon which any argument can be raised is, that on Monday the 19th of February, the order for admitting the *Salmon River* into the King's Dock had not arrived. If between the 18th and the 21st of February, when the order arrived, the river had been open, so that the ship might have proceeded on her voyage, the delay would have been unreasonable, and the underwriters discharged; but the jury have relieved the plaintiff from that difficulty, by finding that from the 18th to the 27th the state of the river was such that the vessel could not have been moved with safety.

*Sir J. Scarlett* and *Bosanquet*, Serjt., contra. The plaintiff in this case ought to have been nonsuited on two grounds. First, the ship was moored in good safety twenty-four hours before the loss. Secondly, the delay at Deptford was unreasonable, and the policy thereby rendered void. Had the captain arrived in the river destined to any particular dock, the underwriter would have remained liable until the vessel could by reasonable diligence be placed in that dock in good safety. But here the vessel was not destined to any particular part of the port of London. No doubt the captain intended to take her into the King's Dock if he could; but that was quite uncertain, and so continued from the 18th to the 21st of February. During that time the underwriters could not remain liable. Again, if the captain did not come to an anchor at Deptford, in order to inquire whether he could go into the King's Dock, he should have proceeded at once to the place of his destination. It was not pretended that his course was impeded by ice on the 18th, and as he then chose to anchor at Deptford, that being a place where timber vessels frequently discharge their cargoes, it must be considered as the place of his destination, and then the vessel had been moored in good safety twenty-four hours before the loss.

Lord TENTERDEN, C. J. Upon the whole, I am of opinion that this rule ought to be discharged. It has been contended that his Majesty's dock at Deptford cannot be considered as the place of destination of the *Salmon River*. But, upon the evidence, I think it was the place of her destination. The master was ordered to take her there, and he came up the river intending to go there. It is true, that at that time he had no right to enter the dock, and it was quite uncertain whether permission to do so would be granted or not. He arrived on the evening of Sunday, the 18th of February; of course he could not then go into the dock, and on the Monday he found that no orders for his admission had been received; and if at that time the vessel could have gone in, her detention at the moorings would have been improper, and the underwriters thereby discharged. That question of fact I left to the jury, and they found that the vessel did not remain at Deptford for want of an order to enter the dock, but because she could not be safely moved to any other part of the river. Another point made was, that the place where the vessel was moored must be considered as her place of discharge, because some ves-

els do in fact discharge their cargoes there. But it was manifest that there never was an intention to discharge her cargo there, the orders to the master being to take her into the King's Dock. That ground of defence therefore fails; and as the delay would only be improper if the vessel could have gone to some other place of discharge in the river, I think that the plaintiff is entitled to retain the verdict found in his favor.

HOLROYD, J. (a) It seems to me that the question is concluded by the finding of the jury, that the state of the river prevented the removal of the ship from the 18th to the 27th of February. Under such circumstances, there could be no improper delay, and there is no ground for considering the place where she was lying as the place of her ultimate destination.

LITLEDALE, J., concurred.

Rule discharged.

(a) Bayley, J., had gone to chambers.

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BRAZIER v. JONES. — p. 124.

In an action against the Marshal for an escape, the declaration alleged, that plaintiff and W. B., having divers disputes, by mutual bonds of submission referred them to the arbitration of C. and D. That an award was made, ordering W. B. to pay the plaintiff a certain sum of money on, &c.; and because the award was not performed, the plaintiff sued and prosecuted out of the Court of C. P., a writ commanding the defendant to attach W. B. (then being in his custody,) so that he might have his body before the Justices of C. P. on, &c., to answer, &c.; and W. B., being and remaining in the custody of defendant as such marshal, by virtue of the attachment, on, &c., was brought before Sir S. G., a judge of C. P., at his chambers, by writ of habeas corpus, and by him committed to the custody of the Warden of the Fleet, and afterwards was brought before Sir J. L., a judge of K. B., at chambers, and by him committed to the custody of the defendant charged with the attachment, and that defendant afterwards suffered him to escape:

Held, that plaintiff was bound to prove the execution of the bond of submission by himself as well as by W. B. Semble, That he need not have done so had he alleged and proved a rule of C. P. ordering the issuing of the attachment, although proof of such rule, without a statement of it in the declaration, would not be sufficient.

Quere, Whether the commitment by a judge at chambers was legal?

THIS was an action against the Marshal of K. B. for an escape. The first count of the declaration stated, that before the committing of the grievances, &c., divers differences and disputes had arisen and were depending between plaintiff and one W. B., and in order to put an end to them it was mutually agreed upon by and between plaintiff and W. B., that all the said matters in difference should be referred to certain persons, to wit, &c.; and thereupon, in pursuance of such agreement, plaintiff and W. B. on, &c., did, by mutual bonds of submission, bearing date, &c., submit themselves to, and bind themselves to abide the award of the said, &c., concerning the said matters in difference under the terms and upon the conditions more particularly set forth in the respective conditions of the said bonds of submission. That the arbitrators afterwards, to wit, on, &c., did amongst other things award, that W. B. should pay to the plaintiff on, &c., the sum of 385*l.*, &c., of all which premises W. B. had notice. And plaintiff, for having performance of the award, procured the bond of submission entered into by W. B. to be made a rule of C. P. And because the award was afterwards, to wit, on, &c., so far as concerned the said W. B., wholly unperformed; and because the day assigned for payment of the said sum of money in the award mentioned had long since



elapsed, the plaintiff on, &c., sued and prosecuted out of the C. P. a writ directed to the defendant, (W. B. then and there being in the custody of the defendant as Marshal of K. B.,) commanding him to attach W. B., so that he might have his body before the justices of C. P. at Westminster on, &c., to answer, &c. And W. B. being and remaining in custody of the defendant as such Marshal, under and by virtue of the said attachment, afterwards, to wit, on, &c., was duly brought before Sir *S. Gaselee*, Knight, then and now being, &c., at his chambers, &c., in his own person, in custody of the said defendant as such Marshal, by virtue of a writ of habeas corpus directed to the defendant; and W. B. was then and there committed by Sir *S. G.* to the custody of the Warden of the Fleet in contempt, for the non-payment of the said sum of 385*l.*, &c. And W. B., being and remaining in custody of the said Warden, afterwards, to wit, on, &c., was brought before Sir *J. Littledale*, Knight, then and now being, &c., at his chambers in, &c., in his own person in custody of the said Warden, by virtue of another writ of habeas corpus; and the said W. B. was then and there committed by the said Sir *J. L.* to the custody of the defendant as such Marshal as aforesaid, charged with the said contempt; and the defendant then and there took the said W. B. into his custody, &c., and afterwards, to wit, on, &c., voluntarily suffered and permitted him to escape. The second count stated, that W. B. on, &c., had been duly committed to the custody of the Warden of the Fleet by Sir *S. G.* in contempt for the non-payment of the sum of 385*l.*, &c., pursuant to the said award so made as aforesaid, and the bond of submission to the said award, and the condition thereunder written and entered into by the said W. B.; and the submission between the said plaintiff and the said W. B. mentioned in the said last mentioned condition, and which had been before that time duly made a rule of the said last-mentioned Court. The declaration then averred a commitment of W. B. to the custody of the defendant by Sir *J. L.*, and an escape as before. Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the Westminster sittings after Trinity term, 1827, the plaintiff proved the execution of the bond of submission by W. B., but not by himself. It was objected that, unless the execution of the bond by both were proved, the submission would not appear to be mutual, and, consequently, the award could not be binding. The Lord Chief Justice reserved this point. It then appeared that the award was not made within the time originally limited, but there was an indorsement on the bond, bearing date before the expiration of that time, whereby it was enlarged, and the award was made within the enlarged time. This indorsement was proved to be in the hand-writing of the arbitrator, but no evidence was given of its being written at the time of its date. The Lord Chief Justice held that such evidence was not necessary, and the award was read. The plaintiff then gave in evidence a rule of C. P., making the submission a rule of court, the rule nisi and the rule absolute for an attachment, the issuing of the attachment, and the commitment of W. B. for the contempt, by a judge at chambers, as alleged in the declaration, and the subsequent escape of the prisoner. For the defendant it was objected, that this commitment was illegal, for that it ought to have been by the Court, and not by a Judge at chambers. This point was reserved by the Lord Chief Justice; and, subject to the questions reserved, the case was left to the jury, who found a verdict for the plaintiff, with nominal damages. In Michaelmas term a rule nisi for entering a nonsuit was granted, against which

Sir *J. Scarlett* and *Patteson* showed cause. It was not necessary for the plaintiff in this case to prove his execution of the bond of submission. All the allegations respecting those preliminary matters were unnecessary, and the declaration would have sufficed had it merely stated the rule of court for an attachment, and the commitment upon it. The case of *Ferrer v. Owen*, 7 B. & C. 427, was very different; the action was brought upon the award, and the plaintiff was bound to show that the award was made upon sufficient authority. Here the proceeding is founded upon the judgment of the Court of C. P.; and, even supposing that judgment to have been wrong, the Marshal cannot be relieved on that ground. [*Bayley*, J. There is not in this declaration any allegation of an application to the Court of C. P., for an attachment against W. B. for nonperformance of the award; there does not, therefore, appear to have been any adjudication upon which the writ of attachment issued. Lord *Tenterden*, C. J. When you declare against the Marshal for an escape out of execution, you always state the judgment as well as the writ.] The first count certainly does not state any order of the Court for issuing the attachment, but it states that it *duly* issued; and the second count begins by stating that W. B. had been *duly* committed to prison. Now, sufficient evidence of a due commitment was given. All the rules of court were given in evidence, and as it was proved that the Court of C. P. had made an order for enforcing the award, the previous allegations became immaterial, and might be rejected, *Bromfield v. Jones*, 4 B. & C. 380. The plaintiff was bound to prove the rule for the attachment, that being material, although not alleged, but was not bound to prove immaterial things, although alleged. [Lord *Tenterden*, C. J. If that were sufficient to support the action, the plaintiff would recover *secundum probata et non allegata*.]

*Gurney* and *Campbell*, *contra*. It is admitted, on the other side, that no sufficient evidence was given of the submission to arbitration, and it is very doubtful, whether the proof of the enlargement of the time was sufficient. The case of a petitioning creditor's debt is somewhat analogous, and that must be shown to have existed at the time of the bankruptcy. Now, it was necessary for the plaintiff to show how he had been damaged, in order to maintain an action against the Marshal; and as the declaration did not set forth any rule of court for the issuing of the attachment, it was incumbent on the plaintiff to prove the submission, in order to make out that he was entitled to have an attachment against W. B. Secondly, the commitment by a judge at chambers was illegal; and unless a party is lawfully in custody, no action lies against the Marshal for an escape, *Rogers v. Jones*, 7 B. & C. 80. (They were then stopped by the Court.)

Lord *TENTERDEN*, C. J. The first point is the only one upon which I propose to say any thing at present, viz., whether the plaintiff, having averred, but not having given evidence of a mutual submission, failed to prove a material allegation. The answer given is, that the allegation was wholly unnecessary, and that sufficient remains if it be struck out, for that, as against the Marshal, proof of the order of the Court of C. P. for the attachment was sufficient. If the declaration had commenced by a statement of that order, I should have been inclined to think it sufficient; but there is no allegation that the Court made an order for the attachment. The averment is, that the plaintiff sued and prosecuted out of the Court of C. P. a writ, commanding the defendant to attach W. B., so that it would appear to be the act of the party. Then it was urged

that proof of the rule for the attachment sufficed, without proof of the mutual submission; according to which argument, want of proof of matter alleged is to be compensated by proof of matter not alleged. I think that would be a most dangerous doctrine. Suppose neither the thing averred nor the matter not averred were proved, still there could be no motion in arrest of judgment, for after verdict it would be assumed that all the allegations of the declaration had been proved. On this ground, I think that the rule for entering a nonsuit must be made absolute.

BAYLEY, J. In an action for an escape, the plaintiff must aver and show in evidence, not only the escape of the prisoner, but that he was previously lawfully detained. Here nothing analogous to a judgment is alleged, but certain other matters entitling the plaintiff to an attachment are shown. Thus the award is stated, but that would not suffice unless made upon the mutual submission of the parties; such submission was, therefore, necessarily alleged; but the plaintiff failed to prove it. I have been considering whether it could, after verdict, be assumed that an order for the attachment was proved; but I am satisfied that it cannot, for the rule is, that you may presume every thing to have been proved which the allegations on the record made necessary, but nothing else. Proof of that order could not, therefore, be properly substituted for proof of an allegation on the record.

HOLROYD, J. Although, if the rule of the Court of Common Pleas for the attachment had been made the foundation of the plaintiff's action, proof of it might have sufficed, still as that was not done, but other things were relied on in the declaration, the plaintiff was bound to give legal evidence of them.

LITTLEDALE, J. It was in the option of the party to begin his declaration with the rule for the attachment, or to state the preliminary matters, and the issuing of the attachment, without mentioning the rule. I think that on a motion in arrest of judgment, either form would have sufficed. But here the question is not as to the form of the declaration, but as to the proof of the allegations. And this does not come within any of the cases as to omitting proof of superfluous allegations, for in all of them there was proof of the material things alleged. Here the evidence relied on was of a matter not alleged. Nor can the rule for the attachment be considered as evidence of the preliminary matters, for it appears to have been made upon reading certain affidavits, the contents of which were not shown. There was no evidence that those affidavits related to the preliminary matters alleged: the rule, therefore, could not be proof of those matters.

Rule absolute.

LOVICK v. CROWDER and Another, late Sheriffs of the City of  
LONDON. — p. 132.

In March, the then sheriffs of London seized the goods of a debtor by virtue of a *fi. fa.* An officer was put in possession of the goods: but the execution creditor directed the sheriffs not to sell, and the debtor continued to have the control of his goods until November, when another execution creditor sued out a *fi. fa.*, directed to the succeeding sheriffs of London: Held, that the latter were bound to levy under this second *fi. fa.*, and that it was their duty, when they found the officer of the former sheriffs in possession, to inquire into the facts; and if they had done so, they would have learned that the first execution was fraudulent.

THIS was an action against the defendants for a false return to a writ of *fi. fa.* issued against the goods of one Harrison. Plea, not guilty. At the trial, before Lord *Tenterden*, C. J., at the London sittings after Trinity term, 1827, it appeared that the plaintiff, having recovered judgment against Harrison, sued out a *fi. fa.* against the goods of Harrison on the 2d of November, 1825, and that the defendants, being at that time sheriffs of London, on the 12th of November returned *nulla bona*; that Harrison carried on the business of a wine-merchant in Fleet Market, and at the time when the writ was delivered to the defendants there were large quantities of wine on his premises. It appeared further, that down to the 2d of November, 1825, the business was carried on on Harrison's account, the clerks or servants always accounting to him for the moneys received. On the part of the defendants it was proved, that on the 31st of March, 1825, a *fi. fa.*, at the suit of one M'Nab, had issued against the goods of Harrison, directed to A. Brown and J. Key, being then sheriffs of London; that they under that writ seized the goods of Harrison, and placed an officer in possession, but that by the direction of M'Nab they had forbore to sell the same, and the goods continued unsold in November, when the plaintiff's writ was issued. It was further proved on the part of the defendants, that the plaintiff, after the return of *nulla bona* had been made by the defendants to his writ of *fi. fa.*, had sued out a *ca. sa.* against Harrison; and that Harrison having afterwards become bankrupt, he had proved his debt under the commission. Upon these facts it was conceded by the defendants' counsel, that M'Nab having allowed Harrison to have the control of the property for so many months, the defendants, if they had been sheriffs of London at the time when the writ issued at the suit of M'Nab, would have been bound to take notice that the first execution was fraudulent, and to levy under the plaintiff's writ; but it was contended that they, having come into office after Harrison's goods had been seized under M'Nab's execution, could not be presumed to have any knowledge of the facts attending that execution; and that finding an officer already in possession, they were not bound to make any inquiry. It was further contended, that the plaintiff had waived his right of action against the defendants, by suing out a *ca. sa.* against Harrison, and proving under his commission. Lord *Tenterden*, C. J., directed the jury to find a verdict for the plaintiff for 259*l.* 1*s.* 9*d.*, the value of Harrison's goods, and gave liberty to the defendants to move to enter a nonsuit. A rule nisi having been obtained by *Gurney* in last Michaelmas term,

Sir *J. Scarlett* and *Platt* now showed cause. As soon as the first fieri facias was executed, and the officer of the sheriff was put in possession, the goods seized were in custody of the law; but as soon as the plaintiff (*M'Nab*) in that execution permitted Harrison to continue to have the control of the goods, and to appear to the world as the owner, he assented that the goods, which for a time had been in custody of the law, should be restored to Harrison. They thereby again became Harrison's property, and the defendants, to whom a fieri facias was subsequently delivered, were bound to seize them. Although the defendants were not sheriffs at the time when the first execution issued, it was their duty to inquire of the officer in possession into the circumstances attending it; and if they had done so, they would have been informed of facts which rendered that execution null and void. Besides, in London, the secondary, who acts under different sheriffs in succession, has the execution of writs, and the defendants must through him have known all the facts. The plaintiff has not waived his right of action by suing out a ca. sa. and proving under the commission, A cause of action accrued to him by the defendants' breach of duty, and the plaintiff has not released it.

*Gurney* and *Comyn*, contra. There was no evidence to show that the secondary was a permanent officer. Here the sheriffs, who seized under the first execution, remained continually in possession down to the time when the second execution took place. The goods were then in custody of the law. The defendants, who afterwards came into office, cannot be presumed to have had any knowledge of the facts attending the first execution, and finding the officer of the former sheriffs in possession, they were bound to consider him as rightfully in possession. At all events, it was a question of fact for the jury, under all the circumstances, whether the first execution was fraudulent and void. The debtor's continuing in possession after the execution, was only evidence of fraud. That was not submitted to their consideration. Besides, the plaintiff having sued out a ca. sa. against Harrison, elected to proceed against his person, and waived all right of action against the defendants.

Lord TENTERDEN, C. J. It seems to have been conceded at the trial, that if the same persons, who filled the office of sheriff in March, when the first execution issued, had filled it in November, they would have been bound to levy; and, consequently, if the defendants had filled the office at those times, they would have been liable in this action. But it was said that the goods, having been seized by the former sheriffs, were in custody of the law, and that they could not, therefore, be seized by the defendants. It seems to me, that they were not in custody of the law at the time when the fieri facias at the suit of the plaintiff was sued out; they were in custody of the sheriff's officer by virtue of legal process fraudulently kept on. The first fieri facias was sued out returnable in Easter term. The sheriff was never ruled to return the writ, and he made no return. Harrison continued in possession, and carried on the business as usual, so far as his failing circumstances permitted. When the plaintiff's writ came to the defendants, and they found the officers of the former sheriffs in possession, it became their duty to inquire by what authority they were there. I think the law does impose on a sheriff the duty of making such inquiry. The possession of the former sheriff is no more than the possession of any third person would be under a bill of sale, *Prec. in Cha.* 286, 287. Now, if a party be in possession of goods apparently the property of a debtor, the sheriff, who has a fieri facias to execute, is bound to inquire whether the party in possession is so bona

fide; and if he find the possession is held under a fraudulent bill of sale, he is bound to treat it as null and void, and levy under the writ. The rule for entering a nonsuit must be discharged.

BAYLEY, J. There cannot be any doubt that these goods were liable to the plaintiff's execution. Where a plaintiff sues out execution, and seizes under a fieri facias the goods of his debtor, and suffers them to remain long in the debtor's hands, a subsequent execution creditor may treat the goods as the goods of the debtor. The only question is, Does the change of sheriff make any difference? Being apparently the goods of Harrison, the defendants ought, *prima facie*, to have seized them, *Rice v. Serjeant*, 7 Mod. 37; *Bradley v. Wyndham*, 1 Wils. 44, 1 Ves. 245. But it is said that they ought to have forborne seizing them, when they found the officer of the late sheriffs in possession. I think, however, that it was the duty of the defendants to ask to see the warrant; and if they had done so, they would have found, from the date of the warrant, that there had been gross delay, and then they would have been bound to treat the first execution as fraudulent and void, and to have seized the goods. But it is said that the subsequent act of the plaintiff has destroyed his right of action against the defendants. But the plaintiff's right of action against them became complete by their breach of duty in not seizing when they ought to have seized, and he has not, by any subsequent act, released or destroyed such right of action.

HOLROYD, J. I think the plaintiff's right of action, if he had one, is not destroyed. The goods were not in custody of the law at the time when the second execution issued. They were originally the goods of Harrison; and the first execution by M'Nab being wholly null and void, they remained the goods of Harrison, notwithstanding that execution, and were liable to be seized by the plaintiff, or any subsequent execution creditor.

Rule discharged.

### The KING v. The Justices of MONMOUTHSHIRE. — p. 137.

Where, upon an appeal against an order of removal, the justices at sessions were equally divided, and made an order, that the hearing of the appeal should be adjourned one of the justices, who voted in favor of the respondent parish, being a rated inhabitant of that parish. An application for a certiorari to remove the order of sessions in order that it and the original order of removal might be quashed, was refused, on the ground that, even if the order of sessions were erroneous, this Court had no jurisdiction to review it.

A RULE nisi had been obtained for a certiorari to remove into this Court an order of two justices of the county of Monmouth, for the removal of James Lewis, his wife and family, from the town of Usk to the parish of Langwn Ucha, and all orders of sessions made thereon or in relation thereto, in order that the order of removal, and also an order of sessions for adjourning the hearing of the appeal against the same order, might be quashed. It appeared by the affidavits, that, on the hearing of the appeal at the Epiphany sessions, 1828, there were four magistrates present. One of these was the removing justice, and a rated inhabitant for the relief of the poor of the town of Usk. He and one other of the magistrates voted for the respondents, and the other two justices for the appellants. The chairman announced that the court were equally divided. The counsel for the appellants moved the court to quash the order of removal, on the ground that the respondents had not made out their case. But the court made an order that the appeal should be adjourned.

*Russell*, Serjt., and *Watson*, now showed cause. This Court is not a court of error to review the judgment of the court of quarter sessions. It is true, that, in *Rex v. Gudridge*, 5 B. & C. 459, it was held, that a magistrate, a rated inhabitant of the parish, ought not to vote on the determination of an appeal against an order for the allowance of overseers' accounts, or even on a question as to granting a case for the opinion of this Court. But in that case this Court only decided, that, under the circumstances, the writ of certiorari ought not to have issued for removing into this Court an order of sessions made under such circumstances. In *Rex v. The Justices of Leicestershire*, 1 M. & S. 442, the Court refused to grant a mandamus to the justices at sessions to hear an appeal against an order of removal, after judgment given by them and entered by the clerk of the peace for quashing the order, the application being made on the ground that justices at sessions were divided in opinion, and that judgment was entered by mistake, instead of an adjournment of the appeal. But *Rex v. The Justices of Monmouthshire*, 4 B. & C. 844, is precisely in point. There, on appeal against an order of removal, the justices at sessions were equally divided in opinion as to a question of fact on which the settlement of the pauper depended. The sessions thinking that it lay on the respondent parish to establish their case to the satisfaction of a majority of the court, quashed the order of removal. The sessions having decided the case, this Court refused to grant a mandamus, on the ground that this Court was not a court of error from that court; that it might compel the court of quarter sessions by mandamus to hear and decide the appeal, but when they had so determined it, this Court could not compel them to correct their judgment if it appeared to be erroneous.

*Campbell* and *Maule*, contra. It must be conceded that this Court is not a court of error to review the decisions of the court of quarter sessions; but here the court of quarter sessions have made the order of adjournment without having any jurisdiction so to do. There were two good votes in favor of the appellants, and only one good vote in favor of the respondents. The vote of the magistrate who was interested was a nullity, *The Parish of Great Charte v. Kennington*, 2 Str. 1173; *Rex v. Yarpole*, 4 T. R. 71; the case of *Foxam Tything*, 2 Salk. 607. And if that be so, then the only judgment which the court had jurisdiction to pronounce, was, that the order of removal be quashed.

LORD TENTERDEN, C. J. This rule must be discharged. But I wish to have it clearly understood that in doing so we do not in any degree intend to sanction a magistrate's voting in any case in which he is interested. This is an application to the Court to quash an order of sessions made for adjourning an appeal, on the ground that upon the question whether the order of removal should be confirmed, the justices were equally divided in fact, though it is alleged that, in point of law, two were for quashing the order, and one only for confirming it; because it is contended that the vote given by one of the justices for confirming the order was a nullity, and therefore the sessions ought to have quashed the order of removal, and not to have adjourned it. The late decisions establish, however, that we cannot assume to ourselves the jurisdiction of a court of error, and revise the judgments of the court of quarter sessions. It is said that the court of quarter sessions, under the circumstances, had not jurisdiction to make the order of adjournment. It is clear that it had jurisdiction to make any order concerning the subject matter of the ap-

peal, and among others, the order that the hearing of the appeal should be adjourned. In *Rex v. Gudridge*, 5 B. & C. 459, the rule which had been obtained was not to review the order of the court of quarter sessions, but to quash a writ of certiorari quia improvide emanavit. The question before the Court in that case was, whether that writ ought to have been allowed to issue to remove an order of sessions made under circumstances nearly similar to those in this case. And this Court thought that the writ of certiorari ought not to have issued. Here a judgment has been pronounced by the court of quarter sessions relating to a subject matter over which that court had jurisdiction; and, assuming that judgment to be erroneous, I think we have not jurisdiction, as a court of error, to review it. This rule must, therefore, be discharged.

Rule discharged.

**BUSZARD and Others, Assignees of JONES and Another, Bankrupts  
v. CAPEL and Another. — p. 141.**

It was stated in a special verdict, that, by an indenture, A. demised to B. all that wharf next the river Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture, the exclusive use of the land of the river Thames opposite to and in front of the wharf, between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised: Held, that the meaning of this finding either was, that the land was demised as appurtenant to the wharf, and then it would be a finding that one piece of ground was appurtenant to another, which in law could not be; or, that the mere use of the land passed by the indenture, and that was a mere privilege or easement, out of which rent could not issue, and consequently, that the lessor could not distrain, for rent in arrear, barges, the property of B., lying in the space between high and low water mark, and attached to the wharf by ropes.

TROVER for two barges; first count on the possession of the bankrupt, second count on the possession of the assignees. Plea, not guilty. At the trial, before Lord Tenterden, C. J., at the London sittings after Trinity term, 1827, the jury found a verdict of not guilty on the first count; and on the second a special verdict, stating, as to the grievances in that count mentioned, that, at the time of making the distress thereafter mentioned, W. R. Jones and G. Jones had become bankrupts, and the plaintiffs had been chosen and appointed their assignees; and that the plaintiffs, as such assignees, before and at the time of the making of the distress thereafter mentioned, were lawfully possessed, as of their property as such assignees, of the barges thereafter mentioned to have been taken and distrained by the defendants; and that by an indenture dated the 9th of March, 1816, and made before W. R. Jones and G. Jones, or either of them, became bankrupts, between one T. Brown of the one part, and the bankrupts of the other part, Brown demised, leased, &c., to the bankrupts all that wharf, ground, and premises next the river Thames, and also all that capital brick built warehouse of three floors, erected and built thereon, abutting north on the river Thames, east on premises in the occupation of T. Flockton, south on the street cartway and common highway leading from Pickle Herring Stairs to Horsley Down Stairs, and west on the Five Footway or Little Wharf for landing goods, and cer-



tain other premises in, the indenture more particularly mentioned, together with free liberty for them the bankrupts, their executors, &c., during that demise, to land and load goods, &c., in common with the rest of the tenants of Brown, at the said Five Footway or Little Wharf fronting the river Thames, together with all cellars, ways, paths, passages, lights, easements, profits, commodities, and appurtenances whatsoever to the said wharf, ground, warehouse, and premises, or any of them, belonging or appertaining; habendum, the same premises, with their and every of their appurtenances, unto the bankrupts, their executors, &c., from the 23d March then past for the term of thirteen years, at the yearly rent of 555*l.*, by equal quarterly payments, payable to Brown, and after his death to the person who should be entitled to the freehold of the premises. The special verdict then stated, that by the indenture the exclusive use of the land of the river Thames opposite to and in front of the said wharf ground between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf ground and premises, but that the land itself between high and low water mark was not demised; that on the 12th of November, 1826, the sum of 565*l.* of the rent was in arrear and unpaid; and that on that day, and at the time of making the distress thereafter mentioned, the two barges, the property of the plaintiffs as such assignees, were attached by ropes head and stern to the wharf ground aforesaid, and were lying and being on that part of the river Thames opposite to and in front of the said wharf ground and premises, and between high and low water mark, the exclusive use of which was demised as aforesaid; that the defendants on the said 12th November, as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and shortly afterwards sold and disposed thereof to satisfy such arrears. This case was argued on a former day in this term by

*Richards* for the plaintiff. The defendants could not by law distrain the barges while they were between high and low water mark, because a distress can only be made on the land out of which the rent issues, and here the rent did not issue out of the land between high and low water mark. That land was not demised, but only an exclusive right to use it. That was a mere easement. In *Co. Litt. 47, a*, it is said, "that it appeareth by Littleton that a rent must be reserved out of the lands or tenements whereunto the lessor may have resort or recourse to distrain, as Littleton here also saith; and, therefore, a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tithes of fairs, markets, liberties, *privileges*, franchises, and the like. But if the lease be made of them by deed for years, it may be good by way of contract to have an action of debt, but distrain the lessor cannot." Here the land between high and low water mark is not demised, but a mere right to use it. That is a privilege or easement, and, consequently, no rent can issue out of it. The 11 G. 2, c. 19. s. 8, enables the landlord to distrain any cattle feeding upon a common appurtenant to the land demised. At common law such cattle could not be distrained, because the soil of the common belonged to the lord of the fee; and the lessor of the land (to which the right of common is appurtenant) could not, therefore, enter on the common land

to distrain. So, in this case, the soil of the land between high and low water mark belongs to the king. The lessor of the wharf, therefore, can have no right to distrain on that land, though he may have, as appurtenant to his land, an exclusive right to use the space between high and low water mark. There are cases where land, having been demised for a term of years, and the lessee having had reserved to him a right of using part of the demised premises after the expiration of the term, his crops have been held to be subject to distress so long as they continued on the land, as in *Boraston v. Green*, 1 H. Bl. 5, and *Knight v. Bennett*, 3 Bing. 364. But in those cases the land itself on which the distress was made was originally demised, and not the mere use of it, as in this case.

*Starr, contra.* The exclusive use found by the special verdict is a certain and determinate interest, or profit, in contradistinction to a profit to be taken in an uncertain place, or to a mere easement, which latter could not be described in the old precedents as appendant or as appurtenant, *Godley v. Frith*, Yelv. 159; but in this case the right of the lessee between high and low water mark is found by the special verdict to be appurtenant. It may be a substantial and tangible interest whereto a lessor may resort to distrain, and yet be appurtenant to land. The technical rule is only that land shall not be appurtenant to land. In Co. Litt. 121, b, it is said that prescription doth not make any thing appendant or appurtenant unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. Mr. Butler, in his note to this passage, after adverting to some examples to show that this position is not universally true, says, "The true test seems to be the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity. In this case the principal is the wharf; the exclusive right to use the land between high and low water mark is the adjunct. They agree in nature and quality, so as to be capable of union without any incongruity; one, therefore, may be appurtenant to the other, and yet not be incorporeal.

But assuming this to be an incorporeal interest, the same remedies are applicable to the recovery of it, and the same consequences of law attach on the demise of it, as upon that of the corporeal principal. It is an interest for the recovery of which an assize of novel disseisin would lie at common law. That is a writ of entry wherein A. complains that B. hath disseised him of his freehold, and the sheriff is to cause that tenement to be resealed, and twelve men to view that tenement, &c., Fitz N. B. 177. Bracton, in his chapter on the Assize of Novel Disseisin, lib. iv. fol. 164, says, "*Locum autem non solum habet hujusmodi assisa in rebus corporalibus sicut in tenementis quibuscunque; verum etiam in rebus incorporalibus sicut in servitutibus et in rebus quæ pertinent ad tenementum sicut in jure pascendi, falcandi, fodiendi et hujusmodi.*" And again in fol. 176, "In quibus casibus omnibus subvenitur disseysito per breve de ingressu secundam formas inferius notandas, tam super possessionibus rerum corporalium, quam super juribus scilicet rebus incorporalibus sicut super jure pascendi et hujusmodi utendi fruendi." Here the lessee had the jus utendi for he had the exclusive right of using the land between high and low

water mark. Again, wherever a view could be had of tenements among which are servitudes, an assize lay for the recovery of the rent, and even a distress might be made upon a servitus for the rent of the servitus, provided it were practicable, Bracton, lib. iv. fol. 181. It has been said that assize lay in these instances only because it was a speedy remedy ; but Bracton, lib. iv. fol. 181, says, that it lies only where strictly applicable ; and, therefore, if the complainant is ignorant of or cannot describe his tenement either in quality or quantity, or its local situation, the writ of assize of novel disseisin will not lie. The remedy by assize of novel disseisin was extended by the statute of Westminster 2d. Lord Coke, in commenting on that statute in 2 Inst. 412, observes that Bracton, who wrote before the making of that act, said that the assize lay for any common appurtenant to the freehold, as for common of pasture or of turbary ; and Lord Coke then says, “ that in the reign of Henry the Third, which was before the making of that act, an assize did lie of common of piscary ; and these opinions had great probability of reason, yet because (as hath been said) there was no writ in the register in those cases, therefore before this act, no writ did lie by the general opinion of the judges ; but now this act hath cleared the question. And Bracton, when he mentions the writ of entry ad terminum qui præterit, lib. iv. fol. 324, asserts, that it will lie for common of pasture dum tamen pastura fuerit certa et designata ad certum numerum averiorum. These writs of entry, therefore, are applicable, the one to that interest in land stated in the special verdict, the other to that right of common which the same interest is admitted to resemble.

Secondly, the same consequences attach upon the demise of it as upon that of the corporeal hereditament. The lessee has acknowledged under his hand and seal that this appurtenant is part of the premises demised in respect of which the rent is reserved. The power of distress is incident to and inseparable from rent service, and to that power there are no stricter limits than the following, which are given in Fleta, lib. ii. c. 49. “ In qualibet captionem tria principaliter requiruntur, certus locus, certa causa, et seisinam alicujus.” In the present case all these three requisites concur. Littleton, sect. 58, does not confine the right of distress to lands, but says, “ If the lessor reserve to him a yearly rent upon such lease, he may chuse for to distrain for the rent in the tenements letten.” Lord Coke, in commenting on this passage, says, that the rent must be reserved out of the lands or tenements whereunto the lessor may have resort to distrain. The reason given by Lord Coke, therefore, why the rent should be reserved out of the lands and tenements is, that there should be a certain place to distrain upon. He afterwards proceeds to say that a rent cannot be reserved by a common person out of an incorporeal inheritance ; as tithes, &c. ; but if lease be made of them by deed for years, it may be good by way of contract to have an action of debt, but distrain the lessor cannot.” This dictum, that it is good by way of contract only, is at variance with what was said by the Court in *Bally v. Wells*, 3 Wils. 25, where tithes were held to be such an estate as would create a privity between the lessor and assignee, so as to make the latter liable upon a covenant running with the tithes. There, it was objected, tithes were incorporeal, and could not support a covenant by the lessee thereof to run with them, so as to bind the assignee. But the Court, in delivering judgment, say, “ There seems to be no difference between an inheritance in

lands and tithes as to this matter. Tithe is the tenth part of the profits of the lands; the profit of the land is the land itself; tithes are tangible and visible; may be put in view in an assize; an ejectment lies of them; a *præcipe quod reddat* lies of a portion of tithes; a warrant may be annexed to incorporeal inheritances. They have every property of an inheritance in land except that they lie in grant, and not in livery." Those observations apply obviously to the nature of the interest which the lessee took in the space between high and low water mark. Again, beasts upon the common might, at common law, be distrained for the rent of the common. In the year-book 26 Hen. 8, p. 5, this case is stated, "In replevin defendant avowed that plaintiff and his ancestors, &c., had used to have common in certain acres of the defendant, for which rent was reserved at the festival of Christmas, which rent was in arrear, and avowed the taking. — Mervin. Sir, it seems to me that the prescription availeth not, for he prescribes to distrain in his own soil, which would be inconvenient. — Fitzherbert. It is a good prescription, and may have a lawful beginning: the soil is not charged with the distress, but only the beasts. Afterwards, on another day, Mervin moved Englefield on the same points, who said as Fitzherbert had said." In Gray's case, 5 Coke, 78, S. C. Cro. Eliz. 405, it was resolved that the lord might distrain cattle for the rent of the common on a common, although there was no prescription to distrain. In the Mayor of Northampton's case, 1 Wils. 115, *Lee, C. J.*, seems to have thought that the owner of the soil might distrain even for stallage, provided the sum were fixed. These authorities show that there may be a distress for rent issuing out of an interest analogous to that which the lessee took under the indenture in the space between high and low water mark. The exclusive use found by the jury was inferred from those acts of enjoyment of which this soil is capable, such as making beds for the barges, clearing out the mud, &c. The interest of the tenant may be likened to the vesture of land, which may be distrained upon, Co. Litt. 47, *a.*; or to those particular rights for any injury to which trespass will lie, as a right to the herbage; or a piscary, Co. Litt. 4, *b.* *Wilson v. Mackreth*, 3 Burr. 1824. *Welch v. Myers*, 4 Campb. 368. These barges, although not "in and upon" the wharf ground, would have had no certain local habitation but for the wharf ground to which they were attached. If these barges were lawfully distrained, when the privilege, of being so attached only was demised, (as the Court of Common Pleas decided in this very case, 4 Bingh. 137,) a fortiori, a distress of them is lawful when in the occupation of the interest stated in this special verdict. They occupied the premises demised according to the mode of occupation of which they were capable.

*Richards*, in reply. The soil between high and low water mark did not pass by the indenture, but the mere right to use it. The land which did pass is described by metes and bounds. Coupling the words of the deed with the finding of the jury, the lessee had a mere easement in the soil between high and low water mark.

*Cur. adv. vult.*

LORD TENTERDEN, C. J. It is difficult to understand what is really meant by that part of the finding of the jury, "that the exclusive use of the land of the river Thames opposite to and in front of the said wharf ground between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was de-

mised as appurtenant to the said wharf ground and premises ; but that the land itself between high and low water mark was not demised." And it is difficult to understand how the exclusive use could be demised, and the land not ; but in either case the distress cannot be supported. If the meaning of this finding be that the land itself was demised as appurtenant to the wharf, that would be a finding that one piece of land was appurtenant to another, which, in point of law, cannot be. If, on the other hand, the meaning be that the use and enjoyment of this land passed as appurtenant, that would be a mere privilege or easement, and the rent would not issue out of that ; the landlord, therefore, could not distrain there for rent issuing out of the land in respect of which the easement or privilege had its existence. That is understood to be the law of the land, and an act of parliament was passed to remedy this inconvenience as far as rights of common were concerned. Taking the finding of the jury in either sense, the defendant had no right to distrain on the premises in question, and the judgment of the Court must be for the plaintiffs.

Judgment for the plaintiffs.

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The Archbishop of CANTERBURY v. TAPPEN. — p. 151.

An administrator is not, by the condition of the bond, given in pursuance of the statute of distributions, 22 and 23 Car. 2, c. 10, bound to distribute the surplus of the intestate's estate after payment of debts, &c., until a decree directing him so to do has been made by the court into which his inventory and account has been exhibited.

. DEBT on bond dated 10th May, 1809. The defendant craved oyer of the bond, by which he, one R. E., and Sir T. H. Page were jointly and severally bound to the plaintiff in the sum of 12,000*l.*, in pursuance of the statute of distributions. He also craved oyer of the condition, which was, that Sir T. H. Page, next of kin, and administrator of B. W., deceased, should make a true and perfect inventory of the goods, chattels, and credits of the deceased, and exhibit the same into the registry of the prerogative court of Canterbury, on or before the last day of November then next, and the same goods and chattels should well and truly administer according to law. And further, that he should make, or cause to be made, a true and just account of his said administration, at or before the last day of May, 1810 ; and all the rest and residue of the said goods, chattels, and credits which should be found remaining upon the said administrator's accounts, (the same being first examined and allowed of by the judge or judges for the time being of the said court,) should deliver and pay unto such person or persons respectively, as the said judge or judges, by his or their decree or sentence, pursuant to the true intent and meaning of an act of parliament, (entitled " An act for the better settling of intestates' estates,") should limit and appoint. And that if any will of the deceased should afterwards be exhibited and proved, he would deliver the said letters of administration into the said court. Plea, that Sir T. H. Page did make and exhibit into the registry of the prerogative court before the last day of November next ensuing the day of the date of the bond, to wit, on, &c., a true and perfect inventory of the goods, chattels, and credits of the deceased, and the same did well and truly administer according to law ; and did make a true and just account of his

said administration before the last day of May, 1810, to wit, on, &c., and that the judge or judges for the time being of the said court have not, at any time hitherto, by his or their decree or sentence, pursuant to the true intent and meaning of the said act of parliament in the condition mentioned or otherwise, limited or appointed the said Sir T. H. Page to deliver or pay all or any of the goods, &c., remaining upon the said administrator's accounts, unto any person or persons whomsoever. But on the contrary, he was, on, &c., cited to appear before Sir J. N., commissary of the said court, on, &c., to exhibit an inventory and render an account; that he did appear, and such proceedings were thereupon had, that on, &c., he was dismissed from all further observance of justice in the said cause; and that it hath not at any time hitherto appeared that there was, or is, any will of the deceased; and this defendant is ready to verify, wherefore, &c. Second plea similar, with the exception that the citation and other proceedings in the prerogative court were omitted. The replication assigned as breaches, first, that Sir T. H. P. did not exhibit a true and perfect inventory, upon which issue was joined; secondly, that B. W. died intestate, leaving Sir T. H. P., A. P., S. O., &c., her next of kin; that after the death of B. W., and before the first of January, 1820, out of certain goods and chattels which came to his hands, Sir T. H. P. paid all the debts, &c., of B. W., and that 10,000*l.* remained over and above in the hands of Sir T. H. P., as administrator, which ought, according to the condition of the bond, to have been well and truly administered by Sir T. H. P. according to law; that is to say, in manner following; that is to say, (&c.) yet that Sir T. H. P. hath not well and truly administered the said last-mentioned goods and chattels, or any part thereof, according to law, or paid, or delivered, or divided the same in manner aforesaid, or otherwise howsoever. Rejoinder, that the judge or judges for the time being of the said court have not at any time by his or their decree limited and appointed Sir T. H. P. to distribute the said last-mentioned goods and chattels in the manner mentioned in the breach, or to any other person or persons whomsoever. Demurrer and joinder.

The case was argued on a former day in this term by *Chitty* for the plaintiff, and *Platt* for the defendant; *Devey v. Edwards and Trippan*, 3 Add. Ecc. Rep. 68, and *The Archbishop of Canterbury v. Howse*, Cowper, 140, were cited for the plaintiff, and *The Archbishop of Canterbury v. Willis*, 1 Salk. 315, and *Greenside v. Benson*, 3 Atk. 248, for the defendant; and now the judgment of the Court was delivered by

LORD TENTERDEN, C. J. This is an action upon a bond executed to the plaintiff, on the grant to Sir T. H. Page, of letters of administration to the effects of Blanch Wollaston. The defendant has prayed oyer of the bond and condition, and they are set forth at length upon the record. The bond is dated on the 10th of May, 1809, and by the terms of the condition the bond is to be void,

First, If the administrator make a true and perfect inventory of the goods, &c., of the intestate, and exhibit the same into the registry of the prerogative court on or before the 10th day of November then next ensuing; and,

Secondly, If he well and truly administer according to law the same goods, &c., and all other goods, &c., that shall come to his hands; and,

Thirdly, If he do make a true and just account of his said administration on or before the last day of May, 1810; and,

Fourthly, if he shall deliver and pay all the rest and residue of the

goods, &c., which shall be found remaining upon his accounts unto such persons respectively as the judge of the court shall by decree or sentence, pursuant to the statute 22 & 23 Car. 2, c. 10, for the better settling of intestates' estates, limit and appoint; and,

Fifthly, If he deliver the letters of administration into Court, in case any will of the deceased shall appear.

The defendant then pleads affirmatively, that the administrator performed the first three branches of the condition; and as to the fourth branch, that the judge of the court has not, by decree or sentence, limited or appointed the administrator to pay the residue of the goods, &c., or any part thereof, which were found remaining upon the said accounts of the administrator, to any person whatever; but that, on the contrary, the administrator was cited to appear before the commissary of the court to exhibit an inventory, render an account of his administration, and see portions allotted, and a distribution made of the goods, &c.; that the administrator did appear in consequence of the citation, and such proceedings were had in the court, that he was duly dismissed from all further observance of justice in the cause.

To this plea, the plaintiff has by replication alleged and assigned, as a breach of the condition, that certain persons particularly named were the only next of kin of the intestate; that the administrator paid all her debts; that goods of great value, and more than sufficient to pay all debts and charges of the administration, came to the hands of the administrator, which ought, according to the condition, to have been duly administered by him according to law; that is to say, in manner following, to wit, by paying certain sums specified in the replication to the persons before mentioned as the next of kin, whereof the administrator had notice; that a reasonable time for doing this has elapsed, yet the administrator has not administered the goods according to law, or paid or delivered the goods, or any part thereof, to the persons before named, or either of them, but neglected and refused so to do, contrary to the effect of the condition, whereby the persons before named have lost the use and profit of their proportions of the goods, &c. To this part of the replication the defendant has rejoined, that the judge of the court has not, by decree or sentence, limited and appointed the administrator to deliver or pay the goods to the persons named, or any other person. And upon this there is a demurrer by the plaintiff, and a joinder in demurrer.

The question of law, therefore, is, Whether the neglect or refusal of the administrator to distribute the surplus or residue of the effects of the intestate among the next of kin, according to the statute of distributions, without the previous decree or sentence of the court, be a breach of the condition of the bond.

The question is not, Whether such a neglect or refusal be a breach of the duty of the administrator, but whether it be a breach of the condition of the bond. And we are all of opinion that it is not. The question does not appear to have been directly decided in any court. According to the report of the proceedings before Sir *John Nichol*, 3 Add. Rep. 68, on the application to allow the bond to be put in suit, that very learned judge appears to have thought, that this neglect might be a breach of the condition, but his attention was not particularly directed to this point; the great contest before him being, whether the sureties ought to be charged under the particular circumstances that had taken place; and if

is obvious, from some parts of his judgment, that he would have thought it right to allow the next of kin to try this or any other doubtful question in a court of law, by an action on the bond, which could not be brought without the permission of the court.

This form of an administration-bond is given by the statute 22 Car. 2, c. 10, the first statute which ordains the distribution of the effects of an intestate among the next of kin. And the bond is obviously intended to secure a performance of what the statute ordains. We should, therefore, examine the statute, and see what it ordains, in order to come at a right construction of the bond, and the terms and meaning of the condition.

From the form of the replication, it appears that the plaintiff insists (and the argument on his part was to this effect) that an administrator cannot be said well and truly to have administered the goods within the meaning of the condition, unless he has paid their distributive shares to the next of kin. The clause in the condition, by which he is required thus to administer, precedes the clause by which he is required to make a true account of his said administration, and this, also, precedes the clause by which he is required to deliver and pay the residue which shall appear upon his account to such persons as the court shall, according to the statute, appoint. Let us, then, see how the order and course of proceeding, thus marked out in the condition of the bond, agrees with the statute.

Now, the statute first requires all ordinaries, as well the judges of the prerogative courts of Canterbury and York as all other ordinaries and ecclesiastical judges having power to grant administration, to take bonds with sureties in the form afterwards set forth. It then enacts, that such bonds shall be good, and that the said ordinaries and judges may proceed and call administrators to account touching the goods, and, upon hearing and due consideration, order and make just and equal distribution of what remaineth clear (after debts and charges paid) among the wife, children, &c., according to the laws in such cases, and the rules and limitations thereinafter set down; and the same distribution to decree and settle and compel the administrators to observe and pay the same by the due course of his Majesty's ecclesiastical laws. The statute then enacts (section 5) that all ordinaries and every other person who by this act is enabled to make distribution of the surplus, shall distribute the whole surplus in manner following; and then mentions the different degrees of kindred and persons to participate in different cases, and their shares; and then, to the end that a due regard may be had to creditors, it enacts that no distribution shall be made until a year after the death of the intestate, and that every one to whom distribution shall be made shall give bond, with sureties, in such courts, to repay to the administrator a ratable part of debts that may afterwards appear, and of the costs of suit and charges that he may be put to by reason of such debts.

The word person in the fifth section of the statute evidently means judge; and from this view of the statute, it appears that the ordinary or judge is to make the distribution among the persons entitled, and that the administrator is to pay according to the sentence of the ordinary, so that the sentence of the ordinary is to precede the payment. And this may in many cases be necessary for the information and protection of the administrator, who, where the claimants are numerous and remote in kindred from the intestate, may not know with certainty what particular persons are entitled, or in what proportions, and may, if he pays



to a person not entitled, be obliged to pay over again to the person legally entitled. And if the administrator has a right to have the sentence of the court before he pays, then, inasmuch as such sentence is only to be pronounced upon the residue of the effects, and after the administrator has furnished an account of his said administration, (which is the language of the condition,) the administration thus referred to cannot be an administration comprising a distribution of the effects among the next of kin; and, consequently, the preceding words of the condition to which the reference is thus made, that is, the words "well and truly administer the goods according to law," cannot be understood of an administration comprising a distribution among the next of kin. It is true that where an administrator intends to act faithfully, and the claims of the next of kin can be, as in general they may be, ascertained without difficulty, he will not put them to the expense and delay of calling for his account, and obtaining the sentence of a court: and therefore it may well be said that it is his duty to make the distribution, although it cannot be said that a forfeiture of the bond is incurred if this be not done.

This construction of the bond agrees with the opinions expressed by Lord Chief Justice *Holt* and by Lord *Hardwicke*. If the words, well and truly administer according to law, import a distribution of the residue among the next of kin, they must, à fortiori, import a payment of debts out of the proceeds of the effects. But in the case of the *Archbishop of Canterbury v. Willis*, 1 Salk. 315, *Holt*, C. J., says, "Whereas by the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and, therefore, a creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him." And in *Greenside v. Benson and Others*, 3 Atk. 248, which was a suit arising out of an action at law on a bond, in which the breach assigned was the not bringing in a true and perfect inventory, Lord *Hardwicke* says, "What the counsel for the plaintiff aim at would have been right, supposing the ordinary had assigned for breach the non-payment of the creditor's debts."

For these reasons, and upon these authorities, we think the breach to which the demurrer applies is not well assigned, and that the judgment must be given for the defendant.

Judgment for the defendant.

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NOTLEY and Others, Assignees of the Estate and Effects of ELIAS JARMAN, Bankrupt, v. BUCK, Esquire. — p. 160.

Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a fi. fa., under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution-creditor: Held, that he was not justified in paying over the money, and was liable to be sued for it by the assignees, in an action for money had and received.

Quære, Whether the sheriff was justified in selling the goods after notice of the bankruptcy?

THIS was an action for money had and received, brought to recover from the late sheriff of Devon the produce of two executions levied by him upon the goods and chattels of the bankrupt. At the trial before PARKE, J., at the Spring assizes for the county of Devon, 1827, a verdict was found for the plaintiffs, damages 1051*l.*, subject to the opinion of this Court on the following case:—

On the 30th of May, 1826, Rickman and Webber obtained judgment as of Trinity term, 7 G. 4, against Jarman, a tanner, in the Court of Common Pleas, by nil dicit, for 800*l.* debt, and 6*l.* 18*s.* damages, in an action upon a bond dated 14th December, 1819. On the 31st of May, 1826, a writ of fi. fa. issued upon this judgment, directed to the sheriff of Devon, returnable on the 7th of June, indorsed to levy 437*l.* On the same 31st of May, Richards and Chadwell obtained a judgment as of Trinity term, 7 G. 4, for 1000*l.* debt, and 6*l.* 10*s.* damages, in the Court of King's Bench, against Jarman by nil dicit, upon a warrant of attorney, dated the 2d of February, 1825, and duly filed. And on the same 31st of May a writ of fi. fa. issued upon this judgment, also directed to the sheriff of Devon, returnable on the 7th of June. Under both these writs of fi. fa. the defendant, being sheriff of Devon, on the 2d of June, 1826, seized the goods and chattels of Jarman, part whereof was liable for excise duty. On the 9th of June, 1826, whilst the said goods and chattels remained unsold, in the possession of the defendant as such sheriff, under the said writs of fi. fa., and also an extent at the suit of his Majesty for 68*l.* 15*s.* 7½*d.* for excise duty due from Jarman to his Majesty, Jarman committed an act of bankruptcy, upon which a commission of bankrupt issued on the 24th of July, and on which he was declared a bankrupt on the 9th of August, and the plaintiffs were afterwards duly appointed his assignees. On the 12th of August, 1826, the defendant, as such sheriff, having notice of the said bankruptcy, sold the goods and chattels so seized, and after satisfying the extent, paid over the net proceeds of such sale, amounting to the sum of 1051*l.*, to the respective creditors, at whose suit the several writs of fi. fa., above mentioned, had issued. This case was argued on a former day in this term by

*Manning* for the plaintiffs. The question in this case depends upon the 6 G. 4, c. 16, s. 108, by which it was enacted, that “no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt; except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors.” In the case of *Taylor v. Taylor*, 5 B. & C. 392, this Court refused to set aside an execution issued upon a judgment by nil dicit on a warrant of attorney, and served and levied by seizure before the bankruptcy; but this case is very different, for the execution may be valid; the sheriff may have done right in seizing and selling the goods, and still he may not be justified in paying over the proceeds to the judgment-creditor; and if so, an action for money had and received lies against him at the suit of the assignees. The case of *Wymer v. Kemble*, 6 B. & C. 479, shows that the present case is within the 108th section; for it was there said, that a per-

son having issued an execution on a judgment, is a creditor, having security for his debt.

*Coleridge* contra. The clause in question may be divided into three parts,—the rule, the exception, and the proviso. The party who issued the execution mentioned in this case may be within the rule, as a creditor having security, but he is also within the exception; for the execution was served and levied by seizure before the bankruptcy. And admitting that he is within the proviso also, still an action at law cannot be maintained against the defendant. If the case be within both the exception and the proviso, it may be considered with reference to the rule only, without considering the rest of the clause. The rule is, that no creditor having security shall receive more than a rateable part of the debt. There was no evidence in this case to show that the judgment-creditor had received more than a rateable part; there was no evidence of the existence of other creditors. But supposing that to be otherwise, it is very doubtful whether the matter can be investigated in a court of law. *Holroyd, J.*, expresses such a doubt in *Taylor v. Taylor*. Again, the section in question was substituted for the ninth section of the 21 Jac. 1, c. 19, which clearly had reference only to proceedings before commissioners of bankrupt; and it is probable that the 108th section of the modern act had reference to similar proceedings. The rule, however, would have been too large; it would have affected all judgment-creditors, and, therefore, the exception was introduced in favour of executions; and then the proviso at the end of the clause was added, not merely to apply to that part of the creditors mentioned in the exception, but it includes all creditors that have issued execution upon judgments by nil dicit, which are for the most part given for more than the sum really due. In such case, the act intended that the party should prove the debt really due before the commissioners, and not the whole amount of the judgment.

*Manning* in reply. If that construction were to prevail, the clause would be rendered nugatory; for the commissioners have no power to compel a party to come before them and prove a debt, or to refund any part of the money obtained by means of an execution, as was lately observed by the Vice-Chancellor in the case of *Gibbins v. Phillips*. (a)  
*Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. The question in this case arises upon the 108th section of the last bankrupt act, 6 G. 4, c. 16. The case states, that two creditors obtained judgment against the bankrupt by nil dicit; the one on a bond, the other on a warrant of attorney. The latter cannot have been an adverse suit, and it does not appear that the former was; and both the judgments are, as stated, within the very words of the proviso.

The proviso is introduced into this act, for the first time, as an addition to the 108d section of the former statute, 5 G. 4, c. 98. The intention certainly was to prevent voluntary preferences; the words may probably go beyond the intention; but if they do, it rests with the legislature to make an alteration; the duty of the Court is only to construe and give effect to the provision. The intention, that a creditor under such circumstances shall not have the full benefit of his execution, but only be paid *pari passu* with other creditors, is sufficiently manifest. The difficulty is, as to the mode of giving effect to this intention, no mode being mentioned in the act. And, upon consideration, it appears to us

(a) Not yet reported.

that the only effectual mode is to prevent the creditor from receiving the money produced by a sale of the goods taken in execution. If the creditor is allowed to receive and retain the money, he will most frequently receive more than a rateable proportion; if he is allowed to receive, and not to retain the money, there must be some mode by which the assignees may recover it from him, because, until the money is in their hands, the rateable proportion to be received by the creditor cannot be ascertained; and if he is liable to refund the money, and is able to do so, the receipt of it, in the first instance, will be of no use to him; if he is unable to refund, he will obtain the advantage which this proviso is intended to prevent. The safe course, therefore, is to say, that he ought not to receive the money; and if he ought not to receive it, but does receive it, then he will have received money belonging, not to himself, but to the assignees of the bankrupt, and will, consequently, be liable to an action at their suit for money had and received to their use. And taking this to be the law, and the true effect of the statute as to the execution creditor, what will be the duty of the sheriff, having, as in the present case, notice of the bankruptcy, the commission, and the adjudication? No other reasonable answer can be given to this question than to say, that the duty of the sheriff is to pay the money to the assignees, to whom it legally belongs, and not to the creditor, to whom it does not belong. And this being his duty, if he does pay the money to the creditor, he places himself in the ordinary situation of a man who, having in his hands the money of A., thinks fit to hand it over to B. The wrongful payment will be no discharge, but he will still be liable to an action at law for money had and received, at the suit of the assignees to whom the money belongs. The seizure, being prior to the act of bankruptcy, will be lawful and right; it is not necessary to say whether the sale be lawful or tortious; the sale may be a lawful act, and yet the proceeds may belong to the assignees; or, if it be wrongful, they may waive the wrong, and sue for the proceeds as money received to their use.

The sheriff may certainly, in some cases, be placed in a situation of difficulty, because the commission may turn out to be invalid; but this difficulty is of the same kind as that in which he is placed in the case of an alleged act of bankruptcy before his seizure, and a commission afterwards, and he has the same modes of relief.

For these reasons we are of opinion, that the plaintiffs are entitled to recover, and the verdict must stand.

Postea to the plaintiffs.

## COLVIN and Others v. NEWBERRY and BENSON. — p. 166.

Where the owner of a ship, by an instrument called a charter-party, appointed G. B. to the command, and agreed that (the ship being tight, &c., and manned with thirty-five men,) G. B. should be at liberty to receive on board a cargo of lawful goods, (reserving 100 tons to be laden for account of the owner,) and proceed therewith to Calcutta, and there re-load the ship with a cargo of East India produce, and return therewith to London, and upon her arrival there and discharge, the intended voyage and service should end. And the owner further agreed, that the complement of thirty-five men should, if possible, be kept up; that he would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage. In consideration of which G. B. agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owner for the use and hire of the ship after the rate of 25s. per ton per month, of which 1000*l.* was to be paid on the execution of the charter-party, and 2000*l.* by two approved bills on Calcutta, one of which was to be payable one month, and the other two months after her arrival there: the residue to be paid or secured to the satisfaction of the owner on the arrival of the ship at London, and previous to commencing the discharge of her homeward cargo. (Certain other stipulations for payment of freight, if the ship were detained in India, were then made.) And it was further agreed, that G. B. should remit all freight-bills for the homeward cargo to B. B. and Co., in London, who should hold them as joint trustees for the owner and G. B.; that they should first be applied to payment of the balance of freight due from G. B., and the surplus, if any, be handed over to him. It was then provided, that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander. C. and Co., in Calcutta, having knowledge of this instrument, shipped goods on board the vessel for London, which were never delivered there: Held, that they might recover against the owner, notwithstanding the agreement between him and G. B., for that it was in the nature of a special appointment of the latter to the command, and was not a charter of the vessel to him.

CASE against the defendants, as the owners of the ship Benson, for the loss of goods, shipped by the plaintiffs in India to be conveyed to England. The first count of the declaration alleged, that the defendants, before and on the 11th day of March, 1817, were owners of the Benson, whereof one George Betham then was master, and which ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river Hooghly, in the East Indies, and bound on a voyage from thence to the port of London; and that the defendants so being owners of the ship or vessel as aforesaid, the plaintiffs heretofore, to wit, on, &c., in the river Hooghly aforesaid, shipped and loaded, and caused to be shipped and loaded, in and on board of the said ship or vessel, whereof the said George Betham then was master, and which said ship or vessel was then riding at anchor in the river Hooghly aforesaid, divers goods and merchandises, to wit, 2171 bags of sugar, and 191 chests of indigo, of them the plaintiffs, then being in good order and well conditioned, and of a large value, to wit, of the value of 20,000*l.* of lawful money of Great Britain, to be taken care of, and safely and securely carried and conveyed in and on board of the said ship or vessel from the river Hooghly aforesaid to the port of London aforesaid; and there, to wit, at the port of London aforesaid, to be safely and securely delivered in the like good order and well conditioned, to certain persons, commonly called and known by the names, and using the style and firm of Messrs. Bazett, Farquhar, Crawford, and

Company, or to their assigns, (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted,) for certain freight and reward, payable by bills in that behalf: and, although the said goods and merchandises were then and there had and received by the said George Betham, so being master of the said ship or vessel as aforesaid, in and on board of the said ship or vessel in the river Hooghly aforesaid, to be carried, conveyed, and delivered as aforesaid; yet the defendants, so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving, and wrongfully and unjustly intending to injure the plaintiffs in this behalf, did not, nor would, take care of, and safely or securely carry or convey the said goods and merchandises, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river Hooghly aforesaid to the port of London aforesaid, nor there, to wit, at the port of London aforesaid, safely or securely deliver the same, or cause the same to be delivered to Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns, although the defendants were not prevented from so doing by the act of God, the King's enemies, fire, or other damages or accidents of the seas, rivers, or navigation of any nature or kind soever; but, on the contrary thereof, they, the defendants, so being owners of the said ship or vessel as aforesaid, so improperly behaved and conducted themselves with respect to the said goods and merchandises, that by and through the mere carelessness, negligence, misconduct, and default of the defendants, and their servants, in this behalf, a great part of the said goods and merchandises, being of great value, to wit, of the value of 10,000*l.* of the like lawful money, became and was wholly lost to the plaintiffs; and, also, thereby the residue of the said goods and merchandises, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was greatly damaged, lessened in value, and spoiled, and the plaintiffs lost and were deprived of divers great gains and profits which might and would otherwise have arisen and accrued to them from the sale thereof, to wit, at London aforesaid. Plea, not guilty. At the trial, before Lord *Tenterden*, C. J., at the London sittings after Michaelmas term, 1826, a special verdict was found as to the promises in the first count of the declaration mentioned, in substance as follows. On the 11th March, in the year of our Lord 1817, the plaintiffs shipped on board the ship *Benson*, near Calcutta, in the East Indies, then riding at anchor in the river Hooghly, 2171 bags of sugar, and 191 chests of indigo, then being in good order and well conditioned, for which the following bill of lading was signed by George Betham, then being the master of the said ship, under the circumstances hereinafter mentioned: "Shipped by the grace of God, in good order and well conditioned, by Messrs. Colvins, Bazett, and Company, in and upon the good ship called the *Benson*, whereof is master, under God, for this present voyage, George Betham, and now riding at anchor in the river Hooghly, and by God's grace bound for London, to say, 2171 bags of sugar, and 191 chests of indigo, being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the aforesaid port of London, the act of God, the King's enemies, fire, and all and every other dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto Messrs. Bazett, Farquhar, Crawford, and

Company, or to their assigns; freight for the said goods being paid by bills." G. Betham received the said goods on board the said ship in the river Hooghly, to be carried and conveyed according to the bill of lading. At the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time, the defendants were the owners of the said ship, and before the said ship sailed to the East Indies, and whilst they were such owners, the following charter-party, bearing date the 7th day of June, in the year of our Lord 1816, was executed by the defendant, Thomas Starling Benson, who was then the managing owner of the ship, and acting on behalf of himself and the other owner of the ship on the one part, and G. Betham, of the other part, for the said ship Benson.

"This charter-party of affreightment, made and concluded in London the 7th day of June, in the year of our Lord 1816, between Thomas Starling Benson, of the city of London, part owner of the good ship or vessel called the Benson, of 573 tons measurement, or thereabouts, now lying in the port of London, of the one part; and George Betham of the city of London, merchant and mariner, freighter of the said ship, of the other part; witnesseth, that the said owner, for the considerations hereinafter mentioned, doth hereby promise and agree to and with George Betham, his executors, administrators, and assigns, that he, G. Betham, shall have, and he is hereby accordingly appointed to, the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso or condition hereinafter contained respecting the appointment of an agent on board the said ship on the part of the said owners. And the said ship being tight, stanch and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in the merchants' service, and for the voyage and service hereinafter mentioned, and being also manned with thirty-five men and boys, the said commander included, he the said George Betham shall be at liberty, and he is hereby allowed and permitted to receive, take, and load on board the said ship, in the port of London, all such lawful goods, wares, or merchandise as he may think proper to ship, not exceeding in the whole what the said ship can reasonably stow and carry over and above her stores, tackle, apparel, and provisions, and reserving sufficient room in the said ship for 100 tons of goods to be laden by or for account of the said owner as hereinafter is mentioned. And the said ship being so laden, he, G. Betham, shall and will set sail therewith and proceed to Calcutta in the East Indies, with liberty to touch at Madeira and Madras in her outward passage; and being arrived at Calcutta aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of East India produce, and return with the same to the port of London, and upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be completed, the act of God, the King's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation of what nature or kind soever excepted. And the said owner doth hereby further promise and agree to and with G. Betham, his executors, &c., that in case any of the aforesaid complement of thirty-five men and boys shall happen to die, or desert, or leave the said ship during the said intended voyage and service, so that the number shall be reduced below thirty-two, that then and in every such event happening, the aforesaid number of thirty

two shall, if practicable, be kept and made up at the expense of the said owner. And further, that the said ship shall at all times during her said intended voyage and service be furnished and provided with proper and sufficient stores, provisions, and other necessary articles, and that the said ship shall, if required, be kept and continued in the service aforesaid for and during the period of twelve calendar months, to be accounted from the twelfth day of the present month of June, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of London, being finally discharged of her homeward cargo, and cleared by the revenue officers. And the said owner doth also promise and agree that the said ship shall, previous to her departure from the port of London on her above-mentioned voyage, be furnished and provided with good water casks, capable of containing eighteen tons of water, and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner, at and after the rate of fourteen pence for every passenger or servant per lunar month, and so in proportion for a less period. In consideration whereof, and of every thing above mentioned, he, G. Betham, doth hereby promise and agree to and with the said Thomas Starling Benson, in manner and form following, that is to say, that he, G. Betham, shall and will take upon himself the command of the said ship for and during her said intended voyage, and until her return to the port of London, and shall and will navigate her to the best and utmost of his skill and ability; and, also, that he, G. Betham, shall and will accept, receive, and take the said ship into his service for and during the term or space of twelve calendar months certain, to commence and be accounted from the 12th day of the present month of June, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to and final clearance in the port of London aforesaid. And, further, that he shall and will well and truly pay or cause to be paid unto the said owner freight for the use or hire of the said ship, at and after the rate of 25s. per ton, register measurement of the said ship per calendar month, for and during the aforesaid term of twelve calendar months certain, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to the port of London, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following: that is to say, the sum of 1000*l.*, part thereof, at or before the execution of these presents; the sum of 2000*l.*, further part thereof, by approved bill or bills to be drawn in London upon Calcutta, in favor of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof, at two calendar months next after the ship shall arrive at Calcutta, and the residue and remainder of such freight to be paid or secured to the satisfaction of the said owner, upon the arrival of the ship in the port of London, and previous to commencing the discharge of her homeward cargo: Provided always, that in case the said ship shall be kept or detained at Calcutta aforesaid more than ninety days, then and in such case the said George Betham doth hereby engage to pay or cause to be paid at Calcutta aforesaid, to the agent of the said owner, the sum of



1000*l.*, either in cash or by bills to be approved of by such agent, in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of 1000*l.* at the expiration of every sixty days after the said ninety days which the said ship may expend or lie at Calcutta aforesaid. And it is hereby declared and agreed by and between the said parties, that bills remitted from India in manner hereinafter expressed shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under and by virtue of these presents as hereinbefore mentioned. And G. Betham doth hereby especially promise and agree, that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of Messrs. Buckles, Bagster, and Buchanan of the city of London, merchants, or indorsed over to them, and delivered to the owner's agent, to be by him remitted to the said Buckles, Bagster, and Buchanan, in London, who, it is hereby especially agreed by and between the said parties, are to receive the amount thereof, as joint trustees for the said owner and G. Betham, he, G. Betham, hereby authorizing and empowering them to appropriate the proceeds of such bills of exchange in or towards payment to the owner of the balance of freight which may be or become due to him under and by virtue of these presents, and the residue, if any, to G. Betham. And G. Betham doth hereby further promise and agree to furnish and provide, at his own expense, sufficient provision and water, and also all other necessaries for the use of the passengers on board the said ship; and that he shall and will pay for all provisions belonging to the owners of the ship which shall be issued for the use of, or consumed by, any of the passengers or servants during the voyage, an account of the same being rendered to him once a week by the said owner's agent, or by the steward on board the ship. And further that all expenses of bulkheads, cabins, and other accommodation for passengers, shall be paid by him, G. Betham; the materials for which are to be left on board the ship at the termination of the voyage, and become the property of the owner. And G. Betham doth also agree to pay and defray all port charges and pilotage which may be incurred by the ship during her intended service, save and except such as may be incurred in the port of London, outward and homeward bound, and once at Calcutta. And G. Betham doth hereby further agree, that the owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard he may think fit, not exceeding in the whole 100 tons, to be delivered at Calcutta: Provided always, and it is hereby expressly agreed and understood by and between the parties to these presents, and particularly by G. Betham, that an agent shall be put on board the ship by the owner for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship for his sole use, and to mess at the said George Betham's table; which agent is to have the sole management, direction, and superintendence of the ship's stores and provisions, and the issuing and delivering out of the same for and during the intended voyage; and such agent is likewise to have the sole ordering and purchasing of any supplies, stores, provisions, and other articles which may be required for the use of the ship during her voyage, and that all bills which may be required to be drawn upon the owners of the ship for any such supplies or otherwise

on account of the ship, shall be drawn by such agent only: Provided also, and it is hereby further agreed by and between the said parties, and especially by the owner, that the freighter shall have the liberty and privilege of employing the ship in the East Indies for any intermediate voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of twelve calendar months, to be computed from and after the expiration of thirty days next after the arrival of the ship at Calcutta aforesaid, upon his, G. Betham's, paying or causing to be paid to the owner the same rate of freight as is hereinbefore stipulated, viz., 25s. per ton per month for all such additional time as the ship may be so employed or detained in India; such additional freight being paid to the owner's agent for the time being, or secured to his satisfaction, previous to the ship entering or proceeding on such additional voyage or service. And it is hereby expressly provided and declared, that in case G. Betham shall proceed with the said ship to any port or place other than Madeira, Madras, and Calcutta aforesaid, without the special leave in writing of the agent of the owner for the time being, or if G. Betham shall be guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in any such case he shall be and become divested of any further command of or in the ship, and it shall thereupon be lawful for the owner's agent for the time being to appoint another commander for the ship in lieu and stead of the said George Betham." This charter-party was made and executed *bonâ fide*. On the 25th of July, 1816, the following memorandum was signed and agreed to by the defendant, Thomas Starling Benson, and the said G. Betham: "Conditions agreed between Thomas Starling Benson, Esq., owner, and George Betham, Esq., commander of the ship Benson, on a voyage to India. Wages, say 10*l.* per month. No primage or privilege of tonnage whatever. Cabin allowance for voyage, (it being understood that the agent, chief and second mates, and surgeon, if any, mess in cabin,) 150*l.*, owner providing nothing. Allowances while in India, three sicca rupees per day." Samuel Oviatt went as agent on board the said ship Benson under the said charter-party, on the said voyage, and carried out letters of introduction from the persons using the said firm of Buckles, Bagster, and Buchanan, being merchants in London, on behalf of the said defendants, to the plaintiffs, by which he was directed to apply to them in case of necessity, and he did apply to them, and they acted as agents at Calcutta, both for the said defendants and G. Betham, as hereinafter mentioned. Samuel Oviatt acted under a power of attorney executed by the defendant, Thomas Starling Benson, which recited the charter-party, and then gave Oviatt authority to do on his behalf all things for which that instrument contemplated the appointment of an agent. Samuel Oviatt carried out with him the charter-party, and communicated it to the plaintiffs as soon as he arrived at Calcutta, and before the shipping of the goods, and the plaintiffs before that time read the charter-party, and received a copy thereof, and for the freight of the said quantity of sugar and indigo in the bill of lading mentioned, the plaintiffs drew bills upon certain other persons, payable sixty days after the ship Benson's arrival in London to the order of Buckles, Bagster, and Buchanan, which bills they delivered to S. Oviatt to be remitted to the said last-mentioned persons, pursuant to the stipulation in the charter-party; and the said bills were so remitted. B. Betham em-

ployed the plaintiffs as his agents at Calcutta, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the ship on the voyage from London to Calcutta, and procured freight for him on the voyage from Calcutta to London; and they had a commission from him for procuring such freight. The ship sailed on her voyage from the river Hooghly to London with the said quantities of sugar and indigo on board; but they never were delivered to the plaintiffs or their assigns pursuant to the bill of lading, although no act of God, the king's enemies, fire, or any other dangers or accident of the seas, rivers, or navigation of what nature or kind soever, prevented the same from being so delivered; but, on the contrary thereof, 1651 bags of the said sugar and twelve chests of the said indigo were wholly lost to the plaintiffs, and the residue of the said sugar and indigo greatly lessened in value. This case was argued on a former day in this term by

*Parke* for the plaintiffs. The effect of this instrument, called a charter-party, was not to demise the ship to Betham, so as to enable him to put her up as a general ship, but was a special appointment of him as master. It does not contain any words of demise; the present case, therefore, does not fall within any of those which establish that where a ship is demised the charterer becomes owner *pro hac vice*. The whole of the instrument in question may be construed as an appointment of Betham to be master under special terms and restrictions. It begins by stating that "the owner, for the considerations hereinafter mentioned, doth hereby promise and agree to and with G. Betham, his executors, &c., that the said G. B. shall have, and he is hereby accordingly *appointed to the command* of the said ship; but with such restrictions as hereinafter mentioned." Now that explains the whole of what follows. Again, the defendants stipulated to have an agent on board, who had power to remove Betham from the command for breach of any of the covenants in the contract made between him and the owners. Betham then was master, and instead of contracting for any fixed wages, he guaranteed to his owners certain profits, and was to retain all the surplus, and third persons were entitled to consider him merely as master, although they knew of the charter-party. Besides, the owners expressly stipulate for a lien upon all freight-bills; and it would be singular if they could insure to themselves all the benefit derived from carrying goods, and avoid the risk. *Boucher v. Lawson*, Cas. Temp. Hardw. 85, 194, is the leading case on this subject. Lord *Hardwicke* there said that owners are liable for the loss of goods on two grounds. First, that they appoint the master; and, secondly, that they receive the freight. In that case the second reason did not apply, and ultimately judgment was given for the defendant; but it is an express authority that if a person be appointed and act as master, the owner is responsible for goods shipped on board the vessel, although there may be some special agreement between him and the master as to the mode in which the wages of the latter are to be paid and the freight received. The authority of the case of *Parish v. Crawford*, Abb. on Shipping, 19, may perhaps be doubtful; but that was a much stronger case than this in favour of the defendant. *James v. Jones*, Abb. on Shipping, 20, and *M'Kenzie v. Rowe*, 2 Campb. 482, which will probably be cited on the other side, are distinguishable; in the former the owner had nothing to do with the freight, in the latter

there was no evidence that the goods were received on board the vessel by any person appointed by the defendants.

*Campbell, contra.* This action, although in form an action on the case, is in reality an action of contract. The cause of action, as stated, does not arise upon the breach of any common law obligation, but upon a breach of duty arising out of a contract, which is the foundation of this action, as well as of an action of assumpsit. The duty of the defendants was to deliver the goods, as alleged in the declaration, if they contracted to do so for a sufficient consideration. It was, therefore, essentially necessary for the plaintiffs to prove the contract as laid. So much is this an action of contract that, according to *Powell v. Layton*, 2 N. R. 365, non-joinder of a party as defendant might have been pleaded in abatement; and *Bretherton and Others v. Wood*, 8 B. & B. 24 (in error), was distinguished from the former case, because the defendants below were charged as common carriers. How then is the contract laid in this case? The declaration states that the goods were shipped to be taken care of, and safely and securely carried and conveyed, &c., *for certain freight and reward payable in bills in that behalf*. That must mean payable to the defendants, and had there been a demurrer to the declaration on the ground that no consideration was alleged, that answer to it would immediately have been given. This consideration was not proved, for the freight was not payable to the defendants, but to Betham, the charterer. Nor was there anything in the transaction that could authorize the plaintiffs to consider the defendants as the receivers of the freight, and carriers of the goods. It is found that the plaintiffs knew all the circumstances, that they read the charter-party, and were furnished with a copy, and that the charter-party was made *bonâ fide* between the parties. That instrument has a double purpose; it first appoints Betham, master, and then charters the ship to him. There is nothing improper in that; an owner may be master, why then should not an owner *pro hac vice*? If that be so, this is like all ordinary charter-parties. It is true that it does not contain express words of demise, but the Court must look at the whole of the instrument, and if it authorizes Betham to put up the ship as a general ship, it is a charter-party. In *Saville v. Champion*, 2 B. & A. 503, and *Tate v. Meek*, 8 Taunt. 280, there were no express words of demise, and it was held that the owner had a lien for his freight, but it was never doubted that the hirer might make what use of the vessel he pleased, for the period of time mentioned in the charter-party. Suppose the same stipulations as to freighting this vessel had been entered into by the owner with a third person, instead of the master, and that by the same instrument Betham had been appointed master, there could be no doubt that such third person must have been considered the freighter, and that shippers, with notice, could not have made the owners responsible for their goods. Then the circumstance of an agent for the owners being on board can make no difference, for his duty was merely to look after the stores, and to take care that the covenants in the charter-party were performed. He had no authority whatever to interfere with the use of the ship. He was like the agent of a mine owner appointed to see covenants for working the mine duly performed by the lessee. There was no privity in this case between the owner and the shipper. If there had been a contract, it must have been reciprocal, but that was clearly not so. The owner could not have sued the shipper for freight, and,

therefore, is not, on the ground of contract, responsible for the goods. The broad question, therefore, arises, Whether an owner is liable in an action founded on an implied contract where the ship has been chartered to a third person. *Boucher v. Lawson* is not in point, the ship was not chartered to the master, and eventually judgment was given for the defendant. *Parish v. Crawford* was only a nisi prius case, and is more than answered by the more recent decisions of *James v. Jones*, and *M'Kenzie v. Rowe*. In the latter case, it is true, the report states, that there was no evidence that the goods were received on board by any person appointed by the defendants, the owners, but that can make no difference, where the shipper knows of the contract made between the owner and master. In *Abbott on Shipping*, p. 22, a doubt is expressed, whether *Parish v. Crawford* can be considered as law, there being no contract, either express or implied, between the owner of the ship, and the proprietor of the goods. For the same reason the present plaintiffs are not entitled to recover.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. This was an action brought by certain persons who shipped goods at Calcutta, in the East Indies, against the owners of the ship, for the loss of the goods. The goods were shipped by the plaintiffs, and the bills of lading were signed by G. Betham, who was the master of the ship. These facts, amongst various others, have been found by a special verdict. The defendants rested their defence on the ground that an instrument, called a charter-party, had been made by one of them, on the part of himself and the other owners, before the ship sailed from London on the voyage to the East Indies; and it was contended that they, having chartered the ship, were no longer liable, as owners, for the loss of goods shipped to be conveyed on the voyage for which the ship was chartered. (His Lordship then stated the particulars of the charter-party, and the other material parts of the special verdict.) Now, the question is, Whether the owners of the ship were, by this instrument, made between them and the master, to be considered as having chartered their ship in such a manner as to be released from the responsibility which belonged to them by the general rules of law as owners, for goods shipped on board their ship. And, on consideration of the case, we are of opinion that they are not discharged by that instrument; for, taking the whole together, it appears to be, in substance, nothing more than the appointment of a master, upon an undertaking by him that the ship shall earn a certain sum, and all beyond that sum was to be for his own benefit, but all loss was to be made good by him; and it is provided that he shall secure the performance of that undertaking, by remitting to the agents of the owners all freight bills drawn in respect of goods shipped at Calcutta. It would certainly create a great deal of confusion, and do a great deal of mischief, as far as regards the shippers of goods, if it were competent for the owners of the ship to discharge themselves from responsibility by means of such a contract as was executed in this instance. It was relied on, during the argument, that the plaintiffs were informed of the nature of that contract; but if the effect of it be not such as the defendants contend for, the responsibility, by the general rules of law,

belongs to them as owners with respect to goods shipped on board their ship. We being, therefore, of opinion that the plaintiffs are not prevented, by a knowledge of that instrument, from suing the defendants, as owners, the judgment of the Court must be for the plaintiffs.

Judgment for the plaintiffs.

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**BELCHER v. W. B. SIKES and Others, Executors of the last Will and Testament of A. BRYMER, deceased, who was surviving Executor of the last Will and Testament of JAMES BRYMER, deceased.**  
—p. 185.

An indenture recited that A. and B., in May, 1813, had entered into a contract with the commissioners for victualling the navy, to supply his Majesty's ships with sea provisions and victualling stores, and that the said A. and B., in September, 1813, had mutually agreed to dissolve the copartnership entered into by them as aforesaid, for carrying on the business of the said contract, and all other contracts entered into with the commissioners by B. or A., and in which they, or either of them, were in any wise interested or concerned, and all other copartnerships whatsoever subsisting between them; and upon the treaty for such dissolution, it was agreed that the share of B. in the property belonging to the copartnership should be estimated at 50,000*l.*, and be taken by A. at that sum. It then further recited that it had been agreed that A. should, by his bond, indemnify B. against all damages by reason of his having entered into the said recited contract with A., and by reason of all other contracts entered into by B. and A. respectively, and in which they or either of them had any interest as aforesaid. The indenture then witnessed that A. and B., by mutual consent, dissolved the said copartnership so entered into, and then or lately subsisting between them for supplying his Majesty's ships with provisions and stores, under or by virtue of the said recited contract, and of all other contracts in which B. and A., or either of them, had any interest or concern as aforesaid. The deed then contained a mutual release of all actions, accounts, reckonings, &c., which either of them (A. and B.) now had or ever had, or which either of them, or either of their executors, should or might thereafter have, claim, or demand against, from, or under the other of them, or his heirs, executors, &c., for or by reason of the said copartnership or copartnerships so thereby dissolved as aforesaid, upon or by reason of any of the acts, matters, and things whatever in any wise relating to the said recited contract, and all other contracts in which B. and A., or either of them, had any interest whatsoever. B. then assigned to A. all the share and interest of him (B.) of and in all the debts and sums of money whatsoever, then due and owing to them (A. and B.) under or by virtue of the same several contracts, or otherwise, and all bonds, bills, &c., relating to the said contract, debts, and sums of money, or any part thereof, and all the goods, stock, and effects whatsoever then belonging to them, the said A. and B., as such copartners respectively, and all the right, title, and interest of him (B.) of, in, to, from, out, or in respect of the premises. A power was then given to A. to recover and give discharge for the said debts.

At the time when this deed was executed, B. and A. had been concerned in conducting business together as contractors for the navy. In some contracts B. was solely interested as contractor; in others, A. was solely interested as contractor; and in some they were jointly interested as partners and contractors. They had, however, both been concerned in all the contracts. A. having been agent in managing those contracts in which A. was solely interested, and B. having been agent in managing those contracts in which A. was solely interested; and there was money due from the commissioners of the navy in respect of each of these classes of contracts: Held, that by this deed, the contracts in which B. had been originally separately interested, were constituted, as between A. and B., partnership contracts, and

consequently, that A. was entitled by the deed to receive all sums due to B., in respect of those contracts, at the time of the execution of the deed.

By the deed, B., for himself, his heirs, executors, and administrators, covenanted that, for and notwithstanding any act done by him, (B.,) it should be lawful for A. to receive the money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of B., his executors, or administrators, or any person claiming under him or them: Held, that the words "for and notwithstanding any act done by B.," being inconsistent with the subsequent part of the covenant, ought to be rejected, and, therefore, that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of B., in respect of the contracts mentioned in the indenture.

DECLARATION stated that heretofore, and in the lifetime of James Brymer, to wit, on the 10th of March, 1814, at, &c., by a certain indenture made between the plaintiff, of the one part, and James Brymer, of the other part, after reciting, amongst other things, that the plaintiff and James Brymer, in or about the month of May, 1813, entered into and signed a contract with three of the commissioners for victualling his Majesty's navy, to supply and deliver on board his Majesty's ships at Halifax in Nova Scotia, Quebec in Canada, Norfolk in Virginia, and the island of Bermuda, all such quantities of sea provisions and victualling stores, consisting of the several articles specified in the contract, as should from time to time be required for the use of the ships, &c., for the space of twelve calendar months certain, and further until six months' notice in writing should be given by either of the contracting parties for the termination of the contract, and for which provisions and victualling stores so to be supplied and delivered, it was agreed that the plaintiff and J. Brymer should be paid at the rates and prices mentioned in the contract, upon production of the vouchers and documents therein also mentioned; and further reciting that the plaintiff and J. Brymer, in pursuance of the contract, supplied and delivered from time to time divers considerable quantities of sea provisions and victualling stores to the said ships and vessels at the several stations aforesaid; and also that the plaintiff and J. Brymer, about the 17th September, 1813, mutually agreed to dissolve the copartnership so entered into by them for carrying on the business of the said contract, and all other contracts entered into with the commissioners for victualling his Majesty's navy by J. Brymer or the plaintiff, and in which they or either of them were in any ways interested or concerned, and all other copartnerships whatsoever subsisting between them; and upon the treaty for such dissolution it was agreed that the share and interest of J. Brymer of and in the moneys, property, and effects belonging to the said copartnership, or to them the said parties on account thereof, should be estimated at the sum of 50,000*l.*, and be taken by the plaintiff at that sum; and that the said plaintiff should thenceforth have the full benefit of the said recited contract, and carry on the business thereof on his own account, and for his own exclusive use; and that he should concur with J. Brymer in an application to the commissioners for victualling his Majesty's navy to withdraw the name of J. Brymer from the said recited contract; and also reciting that the application had accordingly been made to the commissioners, who consented that the name of J. Brymer should be withdrawn, and the same had accordingly been withdrawn from the said recited contract; and also reciting that the plaintiff had paid to J. Brymer 30,000*l.* in part of the said sum of 50,000*l.*, the value of his share of the partnership property,

moneys, and effects, as he, J. Brymer, did thereby admit and acknowledge, testified by his executing the said recited indenture. And the plaintiff, for securing to J. Brymer the payment of the sum of 20,000*l.*, residue of the said sum of 50,000*l.*, and interest from the 1st of January then last past, had accepted certain bills of exchange therein particularly mentioned. And also reciting that upon the treaty for such dissolution as aforesaid, it was further agreed that the plaintiff should, by his bond in a sufficient penalty, save, defend, and keep harmless and indemnified J. Brymer of, from, and against all costs, losses, charges, damages, and expenses whatsoever by reason or on account of his having entered into the recited contract with the plaintiff, and by reason or on account of all other contracts entered into by J. Brymer and the plaintiff respectively, and in which they or either of them had any interest or concern as aforesaid; and, accordingly, the plaintiff had by his bond under his hand and seal, bearing even date with the recited indenture, become bound to J. Brymer in the penal sum of 10,000*l.*, which bond, after reciting as in the indenture mentioned, was conditioned to be void, if the plaintiff, his heirs, executors, or administrators, did and should, from time to time thereafter, at his and their own costs and charges, well and effectually save, defend, keep harmless and indemnified, J. Brymer, his heirs, executors, administrators, and assigns, and every of them, and his and their lands and tenements, goods, and chattels, of, from, and against all claims and demands whatsoever, already made or thereafter to be made by government, upon or against J. Brymer, for or in respect of the said recited contract, or of any other contract or contracts, entered into by J. Brymer and the plaintiff respectively with the commissioners, and in which J. Brymer and the plaintiff, or either of them, had any interest or concern as aforesaid, and, also, of, from, and against all and singular the debts and sums of money, contracts, and engagements, either already or thereafter to be incurred, sustained, made, or entered into, for, or in respect of or relating to the said several contracts, or any, or either of them, and also of, from, and against all actions, suits, costs, losses, charges, damages, and expenses, claims, and demands whatsoever, which should, or might, at any time or times thereafter, be had, brought, commenced, sued, or prosecuted against, paid, borne, or sustained by, or be made upon, J. Brymer, his heirs, executors, or administrators, for, or by reason, or means, or on account of the same debts and sums of money, contracts, and engagements, or any, or either of them, or for, or by reason, or means, or on account of any breach or non-performance, either made or committed, or to be made or committed, of the said several contracts so entered into as aforesaid, or any, or either of them, or any part thereof, or any article, act, matter, or thing whatsoever, in anywise relating thereto. It was witnessed by the indenture that, in further pursuance of the said recited agreement, and in consideration of all and singular the premises, they, the plaintiff and J. Brymer, did, by mutual consent, dissolve and determine the copartnership so entered into, and then, or lately, subsisting between them, for supplying his Majesty's ships, &c., at, &c., with sea provisions and victualling stores as aforesaid, under or by virtue of the recited contract, and of all other contracts in which J. Brymer and the plaintiff, or either of them, had any interest or concern as thereinbefore mentioned, and all other copartnerships subsisting between them, the plaintiff and J. Brymer, in any man-



consequently, that A. was entitled by the deed to receive all sums due to B., in respect of those contracts, at the time of the execution of the deed.

By the deed, B., for himself, his heirs, executors, and administrators, covenanted that, for and notwithstanding any act done by him, (B.,) it should be lawful for A. to receive the money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of B., his executors, or administrators, or any person claiming under him or them: Held, that the words "for and notwithstanding any act done by B.," being inconsistent with the subsequent part of the covenant, ought to be rejected, and, therefore, that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of B., in respect of the contracts mentioned in the indenture.

DECLARATION stated that heretofore, and in the lifetime of James Brymer, to wit, on the 10th of March, 1814, at, &c., by a certain indenture made between the plaintiff, of the one part, and James Brymer, of the other part, after reciting, amongst other things, that the plaintiff and James Brymer, in or about the month of May, 1813, entered into and signed a contract with three of the commissioners for victualling his Majesty's navy, to supply and deliver on board his Majesty's ships at Halifax in Nova Scotia, Quebec in Canada, Norfolk in Virginia, and the island of Bermuda, all such quantities of sea provisions and victualling stores, consisting of the several articles specified in the contract, as should from time to time be required for the use of the ships, &c., for the space of twelve calendar months certain, and further until six months' notice in writing should be given by either of the contracting parties for the termination of the contract, and for which provisions and victualling stores so to be supplied and delivered, it was agreed that the plaintiff and J. Brymer should be paid at the rates and prices mentioned in the contract, upon production of the vouchers and documents therein also mentioned; and further reciting that the plaintiff and J. Brymer, in pursuance of the contract, supplied and delivered from time to time divers considerable quantities of sea provisions and victualling stores to the said ships and vessels at the several stations aforesaid; and also that the plaintiff and J. Brymer, about the 17th September, 1813, mutually agreed to dissolve the copartnership so entered into by them for carrying on the business of the said contract, and all other contracts entered into with the commissioners for victualling his Majesty's navy by J. Brymer or the plaintiff, and in which they or either of them were in any ways interested or concerned, and all other copartnerships whatsoever subsisting between them; and upon the treaty for such dissolution it was agreed that the share and interest of J. Brymer of and in the moneys, property, and effects belonging to the said copartnership, or to them the said parties on account thereof, should be estimated at the sum of 50,000*l.*, and be taken by the plaintiff at that sum; and that the said plaintiff should thenceforth have the full benefit of the said recited contract, and carry on the business thereof on his own account, and for his own exclusive use; and that he should concur with J. Brymer in an application to the commissioners for victualling his Majesty's navy to withdraw the name of J. Brymer from the said recited contract; and also reciting that the application had accordingly been made to the commissioners, who consented that the name of J. Brymer should be withdrawn, and the same had accordingly been withdrawn from the said recited contract; and also reciting that the plaintiff had paid to J. Brymer 30,000*l.* in part of the said sum of 50,000*l.*, the value of his share of the partnership property,

moneys, and effects, as he, J. Brymer, did thereby admit and acknowledge, testified by his executing the said recited indenture. And the plaintiff, for securing to J. Brymer the payment of the sum of 20,000*l.*, residue of the said sum of 50,000*l.*, and interest from the 1st of January then last past, had accepted certain bills of exchange therein particularly mentioned. And also reciting that upon the treaty for such dissolution as aforesaid, it was further agreed that the plaintiff should, by his bond in a sufficient penalty, save, defend, and keep harmless and indemnified J. Brymer of, from, and against all costs, losses, charges, damages, and expenses whatsoever by reason or on account of his having entered into the recited contract with the plaintiff, and by reason or on account of all other contracts entered into by J. Brymer and the plaintiff respectively, and in which they or either of them had any interest or concern as aforesaid; and, accordingly, the plaintiff had by his bond under his hand and seal, bearing even date with the recited indenture, become bound to J. Brymer in the penal sum of 10,000*l.*, which bond, after reciting as in the indenture mentioned, was conditioned to be void, if the plaintiff, his heirs, executors, or administrators, did and should, from time to time thereafter, at his and their own costs and charges, well and effectually save, defend, keep harmless and indemnified, J. Brymer, his heirs, executors, administrators, and assigns, and every of them, and his and their lands and tenements, goods, and chattels, of, from, and against all claims and demands whatsoever, already made or thereafter to be made by government, upon or against J. Brymer, for or in respect of the said recited contract, or of any other contract or contracts, entered into by J. Brymer and the plaintiff respectively with the commissioners, and in which J. Brymer and the plaintiff, or either of them, had any interest or concern as aforesaid, and, also, of, from, and against all and singular the debts and sums of money, contracts, and engagements, either already or thereafter to be incurred, sustained, made, or entered into, for, or in respect of or relating to the said several contracts, or any, or either of them, and also of, from, and against all actions, suits, costs, losses, charges, damages, and expenses, claims, and demands whatsoever, which should, or might, at any time or times thereafter, be had, brought, commenced, sued, or prosecuted against, paid, borne, or sustained by, or be made upon, J. Brymer, his heirs, executors, or administrators, for, or by reason, or means, or on account of the same debts and sums of money, contracts, and engagements, or any, or either of them, or for, or by reason, or means, or on account of any breach or non-performance, either made or committed, or to be made or committed, of the said several contracts so entered into as aforesaid, or any, or either of them, or any part thereof, or any article, act, matter, or thing whatsoever, in anywise relating thereto. It was witnessed by the indenture that, in further pursuance of the said recited agreement, and in consideration of all and singular the premises, they, the plaintiff and J. Brymer, did, by mutual consent, dissolve and determine the copartnership so entered into, and then, or lately, subsisting between them, for supplying his Majesty's ships, &c., at, &c., with sea provisions and victualling stores as aforesaid, under or by virtue of the recited contract, and of all other contracts in which J. Brymer and the plaintiff, or either of them, had any interest or concern as thereinbefore mentioned, and all other copartnerships subsisting between them, the plaintiff and J. Brymer, in any man-

ner, or upon any account whatsoever, and ~~did~~ thereby declare and agree that the same copartnership should be, and be considered, as having ceased, determined, and been utterly void to all intents and purposes whatsoever, upon the said 17th day of September, 1813; and that notice of such dissolution of the said copartnership should be forthwith signed by the said parties, and inserted in the London Gazette. And each of them, the plaintiff and J. Brymer, ~~did~~ thereby, for himself, his heirs, executors, and administrators, release, acquit, and forever discharge the other of them, and his heirs, executors, and administrators, of and from all actions, suits, causes of action, and suits, debts, accounts, reckonings, controversies, sum and sums of money, damages, costs, losses, charges, claims, and demands whatsoever, at law or in equity, or otherwise, which either of them, the said plaintiff and J. Brymer, then had, or ever had, or which either of them, or either of their executors or administrators, could, should, or might thereafter have, claim, or demand against, from, or upon, the other of them, or his heirs, executors, or administrators, for or by reason, or means, or on account, or in consequence of the said copartnership or copartnerships between them, so thereby dissolved as aforesaid, upon, or by reason, or means, or on account, or in consequence of all or any of the acts, transactions, matters, and things whatsoever, in any wise relating to, touching, or concerning the said recited contracts, and all other contracts in which J. Brymer and the plaintiff, or either of them, had any interest whatsoever, or the business or concern thereof, or the said copartnerships, or any or either of them, or on any other account whatsoever, save only and except the said bills of exchange so accepted by the plaintiff as aforesaid, for the purpose of securing the said sum of 20,000*l.* and interest at the times and in the manner aforesaid, and all and every remedies, &c., to be pursued by J. Brymer, his executors, administrators, or assigns, for recovering the payment of the same or any or either of them, and also except the said bond, and all means to be taken or pursued by J. Brymer, his executors, or administrators, for enforcing the due execution and performance of the conditions thereof, or for recovering damages on account of the breach or non-performance of the same or any part thereof. And it was by the indenture also witnessed, that in further pursuance of the recited agreement on the part of J. Brymer, and in consideration of all and singular the premises, he J. Brymer did bargain, sell, assign, transfer, set over, and confirm unto the plaintiff, his executors, &c., all the share and interest of him J. Brymer of, in, and to all and singular the debts, sum and sums of money whatsoever then due and owing to them the plaintiff and J. Brymer by virtue or in consequence of the same several contracts or otherwise, and all bonds, bills, and notes relating to the said contract debts and sums of money, or any of them, or any part thereof, and of and in all and singular other the moneys, goods, chattels, stock, and effects whatsoever and wheresoever then of or belonging to them the plaintiff and J. Brymer as such copartners respectively; and all the right, title, and interest, property, claim, and demand whatsoever of him J. Brymer of, in, to, from, or out of, or in respect of the premises. To have, hold, receive, take, and enjoy the said share and interest of him J. Brymer, assigned or intended to be assigned by the said indenture of and in the said debts, moneys, goods, chattels, and all and singular other the effects and premises thereinbefore mentioned, and every part of the same, and all benefit and advantage thereof unto the plaintiff,

his executors, administrators, and assigns, as and for his and their own proper moneys and effects absolutely, and with full power and authority to and for him and them to recover, receive, and give effectual acquittances and discharges for the same sum and sums of money, debts, and premises, and every part thereof, but subject nevertheless as therein mentioned. And J. Brymer did thereby for himself, his heirs, executors, and administrators (amongst other things) covenant and agree with the plaintiff, his executors, administrators, and assigns that for and notwithstanding any act, deed, matter, or thing whatsoever made, done, committed, or suffered to the contrary by him J. Brymer, it should and might be lawful for the plaintiff, his executors, &c., to have, hold, receive, take, and enjoy the said sum and sums of money, debts, and premises thereby assigned, or intended so to be, and every part and parcel of the same, without any let, suit, interruption, or denial of him J. Brymer, his executors or administrators, or any person or persons rightfully claiming by, through, or in trust for him or them. And, also, that he J. Brymer should not, nor would at any time thereafter, without the consent in writing of the plaintiff, his executors or administrators, or the order, judgment or decree of some court of law or equity for that purpose first had and obtained, receive, release, acquit, or discharge all or any part of the same sum and sums of money, debts, and premises; or without such consent, order, judgment, or decree, revoke or countermand all or any of the powers and authorities thereinbefore contained and given to the plaintiff, his executors, administrators, or assigns; as by the said indenture, reference being thereto had, will, amongst other things, more fully and at large appear. Breach, that the plaintiff could not lawfully, and did not have, hold, receive, take, and enjoy the said sums of money, debts, and premises assigned by the indenture, without any let, suit, interruption, or denial of him the said J. Brymer, his executors or administrators, but, on the contrary thereof, afterwards, and after the death of J. Brymer, and in the lifetime of the said Alexander Brymer, executor as aforesaid of the said J. Brymer, to wit, on the 18th of July, 1817, at, &c., the said A. Brymer, as executor of the said J. Brymer, demanded and received of and from the commissioners, the sum of 20,000*l.*, for and in respect, and on account of the contracts mentioned in the indenture, or some or one of them, and which said last-mentioned sum of 20,000*l.* was part and parcel of the money, debts, and premises assigned by the indenture, and mentioned in the covenant so made by J. Brymer, for himself and his executors in that behalf as aforesaid, and thereby, by the act of him A. Brymer, being such executor, interrupted and altogether prevented the plaintiff from having, holding, taking, and enjoying the said last-mentioned sum, contrary to the tenor and effect of the indenture, and of the said covenant. Second breach, that, after the making of the said indenture, the said A. Brymer, as executor as aforesaid of the said J. Brymer, did, without the consent in writing of the plaintiff, or the order, judgment, or decree of any court of law or equity for that purpose first had and obtained, receive, release, acquit, and discharge another large sum of money, to wit, the sum of 20,000*l.*, part of the said sums of money, debts, and premises in the said covenant in that behalf mentioned, contrary to the form and effect of the indenture, and of the covenant so made in that behalf by J. Brymer for himself and his executors as aforesaid. Third breach, that

A. Brymer, as executor of J. Brymer, did, without the consent in writing of the plaintiff, or the judgment, &c., of any court of law or equity, revoke and countermand the powers and authorities contained in the indenture. First plea, non est factum; second, that A. Brymer did not at any time demand or receive any sum or sums of money, part or parcel of the money, debts, and premises assigned by the indenture and mentioned in the covenant so made by J. Brymer, from the commissioners for or in respect or on account of the contracts mentioned in the indenture, or any of them, in manner and form, &c. Third and fourth pleas negativing in like manner the allegations contained in the second and third breaches.

The cause came on for trial before Lord *Tenterden*, C. J., at the London sittings after Trinity term, 1827, when a verdict was found for the plaintiff, subject to the award of an arbitrator, to whom it was referred to decide upon all matters in difference in that cause; and also to ascertain what sum was received by the late Messrs. Brymer on contracts in which the plaintiff and the late J. Brymer were jointly interested, and what sum, if any, was received on contracts in which they had no joint interest; and the arbitrator was to state the deed for the opinion of the Court, whether the plaintiff was entitled to both, either, and which of the sums. The arbitrator awarded as follows: That the verdict should be entered for the plaintiff upon all the issues, and assessed the damages for the breaches of covenant at the sum of 8594*l.* 2*s.* 2*d.*, which said sum he awarded that the defendants should pay to the plaintiff. The arbitrator also found the following facts upon which his award was founded, and which, by the consent of the parties, were stated in the following form, for the opinion of his Majesty's Court of King's Bench.

For a long period of time, and prior to any of the contracts hereinafter mentioned, J. Brymer and A. Belcher had been concerned in conducting business together as contractors for the navy. In some contracts J. Brymer was solely interested as contractor; in others, A. Belcher was solely interested as contractor; and in some they were jointly interested as partners and contractors. They had, however, both been concerned in conducting all the contracts; A. Belcher having been agent in managing those contracts in which J. Brymer was solely interested, and J. Brymer having been agent in managing those contracts in which A. Belcher was solely interested. Under these circumstances, on the 10th day of March, 1814, A. Belcher and J. Brymer dissolved partnership by the following deed. (The arbitrator, after setting out the indenture stated in the declaration, proceeded as follows:) At the time when this deed was so executed, there were the following sums due from the commissioners of the Navy Board, viz.: under a contract dated the 17th of September, 1793, the sum of 230*l.* 9*s.* 4*d.*; under seven different contracts, two dated the 24th day of January, 1798, one dated the 3d of September, 1798, two dated the 26th of July, 1803, and two dated the 4th of August, 1803, the sum of 7177*l.* 14*s.* 9½*d.*; and, lastly, under a contract dated July 6th, 1807, the sum of 1185*l.* 18*s.* 0½*d.* These several contracts were duly entered into with the Navy Board at the above dates. For all these several sums, which arose from the final settlement of long and complicated accounts under the above contracts, J. Brymer before his death made a claim on the Navy Board. This claim, subsequently to the death of J. Brymer, was renewed by his executor, A. Brymer, and the several sums above mentioned were, after a long investigation, finally allowed, and the money

paid to A. Brymer by the Navy Board in 1817. Of all these transactions A. Belcher was ignorant till long after the receipt of the money by A. Brymer. As to the contract of the 17th day of September, 1793, the arbitrator found as a fact that, prior to the arrangement made by the above deed of the 10th of March, 1814, A. Belcher was solely interested therein as contractor to the Navy Board. As to the contract of the 6th of July, 1807, he found as a fact that A. Belcher and J. Brymer were jointly interested therein, as contractors with the Navy Board, prior to and at the time of the execution of the deed of the 10th of March, 1814. And as to the contracts of the 24th of January, 1798, the 3d of September, 1798, the 26th day of July, 1803, and the 4th of August, 1803, he found that, prior to the arrangement made by the deed dated the 10th of March, 1814, J. Brymer was solely interested therein as contractor with the Navy Board. He then stated that it was contended before him, that, under the true construction of the above deed, all these several contracts were constituted by the parties, as between themselves, partnership contracts, and were included in the provisions of the deed; and that if the Court should think that the deed extended only to contracts with the Navy Board, in which A. Belcher and J. Brymer were jointly interested prior to the time of its execution, then he assessed the damages for the above breaches of covenant at the sum of 1185*l.* 18*s.* 0*½d.*, instead of the sum of 8594*l.* 2*s.* 2*d.*, above awarded.

A rule nisi having been obtained for setting aside the award, or arresting the judgment,

The *Solicitor-General*, *Scarlett*, and *Chilton* showed cause. The question is, whether by the deed of dissolution all the interest of James Brymer in the separate as well as the joint contracts passed to the plaintiff. The intention of the parties must be collected from the whole context and contents of the deed, *Earl of Clanrickard's case*, Hob. 275. The recitals show clearly that the deed is not confined to those contracts in which both Brymer and Belcher were parties, but that it also extends to those in which Brymer was separately interested. The deed recites the contract made in 1813, and that the parties had agreed to dissolve the partnership entered into between them for carrying on the said contract; and all *other* contracts entered into by the said A. Belcher or James Brymer, and in which they, *or either of them*, were interested or concerned. From this recital, therefore, it is clear that other contracts, besides those in which the parties were jointly interested, were in contemplation. Belcher then agrees to indemnify Brymer against all claims to be made on him upon or in respect of the separate as well as the joint contracts. Why should Belcher indemnify Brymer against claims on the separate contracts, unless Brymer's interest in the separate contracts was intended to pass to Belcher? The covenant for the benefit of the assignee must be considered as co-extensive with the covenant to indemnify the assignor. The language of the assigning part of the deed is not so large as that of the recitals; but even that part of the deed, after making specific mention of partnership contracts, conveys "all the right, title, and interest, &c., of him the said James Brymer of, in, to, from, out, or in respect of the premises." The word *premises* connects the assigning part of the deed with the recitals, and, so connected, it embraces all Brymer's interest in his separate as well as his joint contracts. Besides, effect must be given to all the words of the deed. Mention is frequently made of all contracts

in which Belcher and Brymer, or either of them, were interested. It is impossible to give effect to those words without holding that the interest of James Brymer in the separate contracts passed to Belcher by the deed. Then, as to the objection in arrest of judgment, the covenant is, "that for and notwithstanding any act, matter, or thing done by J. Brymer, it shall be lawful to and for A. Belcher, his executors, &c., to have, hold, receive, take, and enjoy the sums of money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of him, the said James Brymer, his executors or administrators, or any person rightfully claiming or to claim by, from, through, under, or in trust for him or them." The objection is, that the act of receiving the money being an act done by Alexander Brymer, the executor of James Brymer, is not within the covenant; that the covenant is confined to acts done by James Brymer, and does not extend to any act done by his executor. But an action lies against an executor or administrator "upon every contract or covenant made by his testator or intestate, which appears by any record or speciality," Com. Dig. Administration, (B.) 14, and even against an executor upon an obligation or covenant to instruct an apprentice in his trade, though it sounds a personal act, *Walker v. Hull*, 1 Lev. 177, and *Benet's case*, Loft. 85. It lies in every case against an executor, although he be *not* named, unless it be such a covenant as is to be performed by the *person* of the testator, and which the executor cannot perform, *Hyde v. Dean and Canons of Windsor*, Cro. Eliz. 552. The covenant in this case is, that Belcher shall receive, without the interruption of James Brymer, his executors, or any person rightfully claiming under him or them. Alexander Brymer claimed and received the money in the character of executor. The Navy Board have attended to no claim that was not made by, from, through, or under James, with whom they contracted. If the construction contended for were to prevail, the consequences would follow that the covenant might be nugatory. Suppose James Brymer had died the day after the execution of the deed, and large sums had been due on these contracts from the Navy Board, and his executors had received those sums, Belcher could not have recovered them. That never could have been the intention of the parties. It being shown that the covenant reaches the executor, this is to be considered as if he, the executor, had covenanted that the plaintiff should receive the money without any interruption. The breach therefore is well assigned; the covenant names the executor, and the breach is, that the executor interrupted. Upon this point they cited *Harwood v. Hilliard*, 2 Mod. 269; *Anonymous*, Skin. 39; *Penning v. Lady Plat*, Cro. Jac. 383; *Bellamy v. Russell*, Sir T. Jones, 186. But even if the breach be too general, it shall be aided after verdict for the plaintiff, *Knight v. Leach*, Comb. 204.

*Denman, Brodrick, and Manning*, contra. First, the judgment ought to be arrested, because the covenant on which the first breach is assigned applies to acts done by the testator only, and not to acts done by his executor; and the breach assigned is in respect of an act done by the executor. The covenant is, "That for and notwithstanding any act done by James Brymer, it shall be lawful for Belcher to receive the money without any let or interruption of him, James Brymer, his executors, &c." The testator binds himself and his executors against any act done by him, James Brymer, in his lifetime. [Lord Tenterden, C. J. Must not the words "for and notwithstanding any act done" be rejected as insensible,

they being wholly inconsistent with the subsequent part of the covenant, by which Brymer agrees that Belcher shall receive the money without the interruption of him or his executors? — *Bayley, J.* May not the meaning be, for and notwithstanding any act done before the execution of the deed?] The words are not in the past tense. The particular sense of those words must be collected from the context. Upon this point they cited *Rich v. Rich*, Cro. Eliz. 43; *Broughton v. Conway*, Dyer, 240; *Ford v. Wilson*, 8 Taunt. 543; *Nind v. Marshall*, 1 B. & B. 319. The objection to the second and third breaches is stronger. In the covenants on which those breaches are assigned, Brymer covenants merely for the act of himself; it is the same thing as if he covenanted for the act of John Styles. Any act done by any other person would not be a breach of that covenant.

The principal question depends on the construction of the deed. Belcher, in this action of covenant, at all events can only recover a moiety of the sums received in respect of those contracts in which he and Brymer were jointly interested. The other moiety, being his own share of the proceeds of the contract, belongs to him independently of the deed, and must be recovered in an action for money had and received. The arbitrator has found three distinct classes of sums received — the first on account of a contract in which Belcher was solely interested; that sum also belongs to Belcher independently of any covenant, and cannot, therefore, be recovered in this action; the second, on account of contracts in which they were jointly interested; and the third, on account of contracts in which Brymer was separately interested. The intention of the parties must undoubtedly be collected from the whole deed. The difficulty is created by the introduction into the recitals of the unnecessary words “respectively or either of them;” for if full effect be given to those words, the construction must be that the deed extends to separate contracts. Such a construction is, however, at variance with the general intention of the deed. If those words be rejected as surplusage, then all the provisions of the deed will be consistent with each other, and it will be clear that all that was intended to be assigned was the interest of Brymer in those contracts in which he and the plaintiff Belcher were jointly interested. The primary object of the deed was to dissolve and determine the partnership of Belcher and J. Brymer, in contracts for victualling his Majesty’s navy. It is true that the deed recites that it had been agreed to dissolve and determine the copartnership entered into by them for carrying on the business of the said contract and all other contracts in which *they or either of them* were in any wise interested or concerned. The words “or either of them,” here introduced, are insensible, and must be rejected, because there could not be a partnership in a contract in which one only was interested. The deed then recites that James Brymer’s share in the property belonging to the partnership should be estimated at 50,000*l.*, and should be taken by Belcher at that sum. That was the calculated value of Brymer’s interest in the partnership property. It follows, therefore, that no consideration was paid to Brymer for his interest in the separate property. It is true, that in the clause of indemnity, the words “or either of them” again occur; but those words must be rejected, and then that clause will correspond with the general intention of the deed. By the operative part of the deed, the parties dissolve and determine the said copartnership so entered into, and now or lately subsisting between them for supplying his Majesty’s ships with provisions under or by virtue of the said recited contract, and of all other contracts in which the said James Brymer and



Andrew Belcher, or either of them, had any interest or concern. Now, though the words "or either of them" occur here, the dissolution must have reference to contracts in which the parties were jointly concerned. By the assigning part of the deed, Belcher is to have the share of Brymer in all the debts due and owing to them (not to *either* of them) under and by virtue of the several contracts; and the word *premises*, which afterwards occurs, refers to the debts last before mentioned. There then follows a power to Belcher to recover and give discharges for the said debts. That must mean partnership debts; for if it were intended to authorize Belcher to receive money due to Brymer on those contracts in which he was separately interested, a power of attorney would have been executed for that purpose. The omission of such a power of attorney is conclusive to show that the separate interest of James Brymer was not intended to be conveyed.

Lord TENTERDEN, C. J. I am of opinion that the plaintiff is entitled to recover the whole sum upon the first breach. The principal question depends on the construction of the deed, and in deciding it, we must not merely consider the situation of the parties before the execution of the deed, but the situation in which they chose to place themselves by that deed. The arbitrator in his award states, that James Brymer and Belcher (the plaintiff) had been concerned in conducting business together as contractors for the navy; that in some contracts James Brymer was solely interested as contractor, in other contracts the plaintiff was solely interested as contractor; in some they were jointly interested as partners and contractors; they both, however, had been concerned in all the contracts, for the plaintiff had been agent in managing those contracts in which Brymer was solely interested, and Brymer had been agent in managing those contracts in which the plaintiff was solely interested. Under these circumstances, on the 10th of March, 1814, they dissolve partnership by the deed set out in the award. After stating the dates of the several contracts, and the sums due from the Navy Board, and received by A. Brymer upon them respectively, the arbitrator states, that it was contended before him that under the true construction of the deed all these several contracts were constituted by the parties as between themselves partnership contracts, and were included in the provisions of the deed. I can easily understand why they should wish to do this. Unless something of this kind was done, it would have been necessary to take an account of every contract in which they were separately concerned, and in which the relation of principal and agent subsisted between them. That not having been done, it may reasonably be supposed that the parties might, in order to put an end to all contracts, elect to consider all contracts as partnership concerns; and looking to the whole of this deed, I think that intention may be collected from its different recitals and provisions. The deed recites a contract then in esse, which had been made in May, 1813, and that the plaintiff and Brymer on the 17th of September, 1813, agreed to dissolve the copartnership for carrying on the business of the said contract, and all other contracts entered into with the commissioners for victualling the navy by Brymer or the plaintiff, and in which they or either of them were in any ways interested or concerned; and all other copartnerships whatsoever subsisting between them. These latter words must mean partnerships in other contracts besides those entered into with the commissioners of the navy. It seems to me from the reci-

tal, that there was a manifest intent to treat all the contracts as having been copartnership transactions. I cannot otherwise find any sense for the words, "or either of them," which occur not only in the recital, but in the other parts of the deed. The next recital is that upon the treaty for the dissolution, "it was agreed that the share of Brymer in the money and property belonging to the said copartnership, or to them, the said parties, on account thereof, should be estimated at 50,000*l.*, and be taken by the plaintiff at that sum; and that it had been agreed that the plaintiff should by bond indemnify Brymer against all losses and damages by reason of his having entered into the recited contract, and by reason of all other contracts entered into by Brymer and the plaintiff respectively, and in which they or either of them had any interest or concern." Now, why should Belcher become bound to indemnify Brymer against all damages by reason of the separate contracts of Brymer, unless the intent of the deed was that all the separate contracts of Brymer should, as between the parties, be considered as joint contracts? Then, by the operative part of the deed, the parties dissolve the copartnership entered into between them for supplying his Majesty's ships, under or by virtue of the recited contract and all other contracts in which they or either of them had any concern. Strictly speaking, there could not have been a partnership in a contract in which one party only was interested. But the parties (who had been partners in some contracts) might have agreed that between themselves, all the contracts which either had entered into in his own name and on his own account, should be considered partnership contracts. They then release each other from all actions, &c., not only in respect of the recited contract, but of all other contracts in which Brymer and the plaintiff, or either of them, had any interest whatsoever. The release, therefore, extends to contracts in which Brymer was separately interested. Then come the words of assignment; Brymer assigns to the plaintiff all the share and interest of him, Brymer, of and in all the debts then due and owing to them, the plaintiff and Brymer, by virtue of the same several contracts or otherwise; and all bonds and bills relating to the said contract, debts, and sums of money, or any of them; and of and in all other the moneys of or belonging to the plaintiff and Brymer as such copartners respectively, and all the right, title, and interest, property, claim, and demand whatsoever of him, Brymer, of, in, to, from, out, or in respect of *the premises*. The subject matter of the assignment is there described by words of reference. We must look back to the antecedent parts of the deed, to learn what those words refer to, and then it appears that the interest of Brymer, in respect of the premises, comprehends his right to receive any sums due from government in respect of the contracts, in which he had been separately interested. My opinion is, that whatever may have been the interest of the parties originally in the several contracts, they did by this deed consent to be considered as copartners, from the first, in all contracts entered into by both conjointly or by either of them on his separate account, and that they adopted this as the best mode of settling their disputes. The remaining question is, Whether the breach of covenant is well assigned. The breach is, that the executor of James Brymer received from the commissioners of the navy a sum of money in respect of the contracts mentioned in the deed, and thereby prevented the plaintiff from receiving the same. The objection is, that the covenant extends only to acts done by Brymer himself, and that the receipt of the

money charged in the breach being an act done by the executor, is not within the covenant. It seems to me, that the covenant is not confined to acts done by James Brymer. The words "for and notwithstanding any act done by James Brymer," seem to have been copied by the person who drew this deed from a covenant for title in a conveyance of real property. These words are wholly inconsistent with the words in the latter part of the covenant, by which Belcher is authorized to receive the money, &c., assigned by the indenture without the interruption of James Brymer, his executors, or any persons claiming under him or them. They cannot both stand without making the covenant insensible. One or the other, therefore, must be rejected, and I think that as the subject matter of this covenant is one in respect of which an executor is generally liable, the words "for and notwithstanding any act done by James Brymer," ought to be rejected; and then the covenant will be that Belcher shall receive the money without the interruption of James Brymer, or his executors, and the breach is well assigned. The rule for setting aside the award and arresting the judgment must, therefore, be discharged.

BAYLEY, J. I think the arbitrator has properly decided that those contracts which were not originally partnership contracts, were made so by the parties when they executed this deed. At the time when the deed was executed, there had been some contracts in which the parties had been jointly interested, and others in which each of them had been separately interested; but in the latter, one of the parties had acted as agent for the other. They were in some degree concerned together in all contracts. This being the state of things at the time when the deed was executed, it would have been necessary to make a provision that there should be taken an account of the sums each partner was entitled to receive on the joint as well as on the separate contracts in which one had acted as agent for the other. If this deed had not been intended to embrace all the contracts, it would undoubtedly have made provision for the winding up of the accounts between the parties, or at least it would not have altogether prevented such a future settlement of accounts. Now, the clause by which it is stipulated that mutual releases shall be given, shows clearly that it was the intention of the parties that there should be no future reckoning or accounting between the parties. By that clause each party discharges the other from all accounts, reckonings, &c., which either of them had or might thereafter have, for or by reason or on account of the said copartnership, or on any other account whatsoever." This clause entirely prevents all future reckonings between the parties upon any contract entered into by one or the other. It is quite clear, that but for this clause there must have been reckonings between the parties. It, therefore, explains the rest of the deed, and shows clearly that the word *respectively* and the words *or either of them*, which occur frequently in the deed, were introduced intentionally, and not by mistake. It seems to me, therefore, that the plaintiff was entitled to receive all moneys due from the Navy Board on contracts in which Brymer was either separately or jointly interested. I think also that Alexander Brymer, the executor of James Brymer, having wrongfully received the money which the plaintiff ought to have received, has committed a breach of covenant. The words "for and notwithstanding any act done," may perhaps be understood to refer to an act already done at the time of the execution of the deed, or, if they will not bear that sense, they ought to be rejected.

LITLEDALE, J. Assuming the arbitrator's construction of this deed to be correct, I think that there is no objection to entering the verdict for the entire sum upon the first breach assigned. The words "notwithstanding any act, deed, matter, or thing done by James Brymer," if they had stood by themselves, would have confined the covenant to acts done by him only. The words "without the let, suit, or interruption of him, James Brymer, his executors or administrators," &c., extend the covenant to acts done by his executors. They are clearly sufficient to make his estate responsible; and if it were necessary, in order to make the covenant consistent, to reject any of the words, I should be disposed to reject the first words rather than the latter. I entertain more doubt as to the second and third breaches; but it is unnecessary to decide whether they are good or not. Then it is said that Belcher is only entitled to recover a moiety. I think it is not necessary that an action for money had and received should be brought, or a bill in equity should be filed, in order to enable the plaintiff to recover the sums due to him in his own right, independently of any covenant in the deed; inasmuch as the whole is mixed up together, and the damages are entire. But I own I have considerable doubt as to the true construction to be put on this deed. I admit that it is reasonable that the supposed arrangement should have taken place. I doubt, however, whether the language of the deed is sufficient to effect such a purpose. It is a rule, in construing deeds, to give effect to all the words, and undoubtedly, if full effect be given to the words "*or either of them*," there is an insuperable objection to any other construction of the deed than that put upon it by my Lord and my Brother *Bayley*. But the language of the operative part of the deed is at variance with such a construction. The parties by mutual consent dissolve the copartnership for supplying his Majesty's ships with sea provisions under or by virtue of the said recited contract, and of all other contracts in which the said A. Belcher and James Brymer had any interest or concern. Now, how could they dissolve a partnership in a contract in which one only was interested? Besides, 50,000*l.* was the consideration paid to Brymer for his assigning his interest to Belcher in the property belonging to the partnership. There was no consideration for his assigning his interest in the separate contracts. From these parts of the deed I should think it was not intended to include contracts in which either party was separately interested. But, on the other hand, there is a difficulty created by the indemnity clause; for Belcher is to indemnify Brymer against all claims made by government in respect not only of the joint, but of the separate contracts. That clause rather shows that the interest of Brymer in the separate contracts was in the contemplation of the parties. And when I find the words "*or either of them*" occurring so frequently in this deed, I cannot say that I differ from my Lord and my Brother *Bayley*, but only that I entertain considerable doubts.

Rule discharged. (a)

(a) This case was argued and determined on the 1st of May; but the report of it was unavoidably postponed.

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GROOOCK v. COOPER and Others. — p. 211.

By the 6 G. 4, c. 16, s. 33, commissioners of bankrupt are authorized, by writing under their hands, to summon before them certain persons; and if any such persons

so summoned shall not come before them at the time appointed, having no lawful impediment made known to them at the time of their meeting, and allowed by them, it shall be lawful for them, by warrant under their hands and seals, to authorize the person therein named to apprehend such person, and bring him before them to be examined: Held, that in order to justify the commissioners in issuing their warrant for the apprehension of a witness to whom they had directed a summons, it was necessary that a reasonable time should intervene between the service of the summons and the time when the witness was thereby required to attend, and that the question, whether the service of the summons was in that respect reasonable or not, was a question of fact to be submitted to a jury. Semble, That the commissioners are not bound to have information on oath of the service of the summons before they issue their warrant, but that it is sufficient if the summons be actually served.

TRESPASS for false imprisonment, brought by the plaintiff against the defendants, who were commissioners under a commission of bankrupt issued against Messrs. Silvey and Sanderson. At the trial, before Lord *Tenterden*, C. J., at the London sittings after Trinity term, 1827, it appeared, that on Monday, the 17th of April, 1826, at five o'clock in the evening, the plaintiff was served in London with a summons, whereby he was required to attend before the defendants at Norwich on the following morning at 10 o'clock, to give evidence before the commissioners under the commission against S. and S. The plaintiff told the person who served the summons that it was impossible for him (the plaintiff) to attend on so short a notice, as he had an engagement to attend a gentleman from the West Indies (whom he named) on the following morning, to select goods for the Demerara market, and that he and that gentleman had also to prove a will under which they were joint executors, and desired the person who served the summons to write down to the commissioners to inform them of the reasons why he could not attend. Before the person who served the summons left the plaintiff, he tendered him 5*l.* for his expenses in obeying the summons. The plaintiff also told the person who served the summons, that if any day after Wednesday in the following week were appointed he would attend, and begged that information to that effect might be sent to the commissioners. The plaintiff was then asked, whether the Friday following would suit, and he replied it would not. The London agents to the solicitors to the commission wrote a letter on the evening of the next day, (Tuesday,) the 18th of April, to the commissioners, and informed them of the service of the summons and of the grounds assigned by the plaintiff for not attending; and the commissioners having received the letter on Wednesday, the 19th of April, signed a warrant for taking the plaintiff into custody, and he was taken into custody, by virtue of that warrant, on Thursday, the 20th of April, and conveyed down to Norwich, and detained in custody until his examination was closed. It was proved that four coaches left London for Norwich daily, after five o'clock in the evening. It was admitted that plaintiff was a person liable to be summoned, within the 6 G. 4, c. 16, s. 33 (a); but it was contended, on the part of

(a) Sect. 33, of the 6 G. 4, c. 16, enacts, "that after adjudication, it shall be lawful for the commissioners, by writing under their hands, to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate, of such bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt; and it shall be lawful for the commissioners to require such person to produce books, &c., in his custo-

the plaintiff, that the defendants were not justified in issuing their warrant, inasmuch as the summons was not sufficient, there not having been a reasonable time, between the service of the summons and the return, for the plaintiff to go down to Norwich, and, at all events, that this was a question of fact to be submitted to the jury. Secondly, that the warrant itself was illegal, because the defendants had granted it without having before them any information on oath of the service of the summons; and, thirdly, that the sum of 5*l.*, tendered to the plaintiff for his expenses, was not sufficient. Lord *Tenterden*, C. J., was of opinion that it was not necessary that the commissioners should have information before them on oath of the service of the summons, to justify them in issuing the warrant; that in a superior court such information on oath was necessary; but no action would lie against a judge of such a court for unlawfully issuing a warrant. Whereas, if a party were arrested on an unlawful warrant issued by commissioners of bankrupt, he might have redress against them by an action at law. If a summons was, in fact, served, and no lawful impediment was made known to and allowed by the commissioners, their warrant in this case was lawful. If they acted on a mere supposition that the summons had been served, they did so at their peril; but if such a summons had been served, and there was no lawful impediment made known to them, they would be justified. Here the summons was in fact served; and the only question was, Whether any lawful impediment was made known to and allowed by the commissioners. It seemed from the word *allowed*, that they had a discretion vested in them to say whether the impediment made known to them was sufficient or not. But was any lawful impediment made known to them. The commissioners were informed by the letter that the plaintiff had alleged private business as a ground for not complying with the summons. But if his private affairs did, in fact, require his attention, that was not a sufficient impediment. The defendant might have reached Norwich before the return of the summons; and it was never suggested to the commissioners that the state of his health prevented his performing the journey within the time. Then there was no lawful impediment, and the warrant was therefore legal. On these grounds his Lordship directed a nonsuit. *Campbell* in last Michaelmas term obtained a rule nisi for setting aside the nonsuit, on the grounds urged at the trial.

The *Solicitor-General* and *Alderson* on a former day in this term showed cause. The nonsuit was right. The plaintiff ought to have made known to the commissioners at their meeting some lawful impediment, and that ought to have been allowed by them. Here the only impediment made known to the commissioners was, that the plaintiff had private business to transact. That was no lawful impediment. He did not allege that he was prevented by ill health; and there was ample time between the service of the summons and the return for a person in sound health to have gone to Norwich. Secondly, it was not neces-

dy, which may appear to them necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the commissioners are authorized to inquire into; and if such person so summoned shall not come before the commissioners at the time appointed, having no lawful impediment, (made known to the commissioners at the time of their meeting and allowed by them,) it shall be lawful for the commissioners, by warrant under their hands and seals, to authorize the person therein named for that purpose to apprehend and arrest such person, and bring him before them to be examined as aforesaid."

sary that the commissioners should, in order to justify them in issuing their warrant, have had the service of the summons proved on oath before them. The fact of the summons having been served gives them jurisdiction to issue their warrant, and not the information of that fact on oath. Justices, on the contrary, are justified by information on oath, whether the fact be true or false.

Then as to the third point, that the sum of 5*l.* only was tendered to the plaintiff: he made no objection at the time to the amount of the tender, and this was not an impediment made known to the commissioners. Besides, *Battye v. Gresley*, 8 East, 319, is an authority to show that it is not necessary, upon summoning the witness, to tender his expenses beforehand; though if he be, in fact, without the means of taking the journey, it may be an excuse for not obeying the summons.

Sir *J. Scarlett and Campbell*, contra. By the 6 G. 4, c. 16, s. 33, the commissioners are authorized to summon all persons therein described; and if any such person so summoned shall not come before them at the time appointed, having no lawful impediment made known to the commissioners at the time of the meeting, and allowed by them, the commissioners may issue their warrant. The act, therefore, requires that the party shall be summoned in a lawful manner. Here the plaintiff was not summoned within the meaning of the act of parliament; and if he was not duly summoned, he was not bound to make any excuse for not attending. This case must be considered, therefore, as if he had made none. Suppose a motion were made for an attachment for not obeying a subpœna, it would be necessary to show that the subpœna had been served, so as that the party whose attendance as a witness was required, might reasonably be expected to attend. Then the question in this case is, whether the plaintiff, who was summoned at five o'clock in the evening, could reasonably be expected to attend at Norwich at ten o'clock the next morning. Was he bound to neglect all his other business? Suppose he were infirm or in ill health, would he, in order to reach Norwich at the hour appointed, be bound to travel during the night? And, at all events, whether the service of the summons were reasonable or not, was a question of fact which must depend on a variety of circumstances, as the sex, age, or state of health of the party summoned. It ought to have been submitted to the jury, whether, with reference to all the circumstances, the plaintiff could reasonably be expected to comply with a summons (served at five o'clock in the evening) requiring him to attend at ten o'clock the next morning at Norwich. Assuming that the service of the summons was reasonable, the commissioners ought to have had information on oath of the service of the summons. A magistrate has no power to commit for an offence without information on oath, *Morgan v. Hughes*, 2 T. R. 225. [*Bayley, J.* The only question there was whether case or trespass was the proper form of action.] Lastly, the defendant was not bound to obey the summons without a tender of a sum of money sufficient to defray his reasonable expenses in going to and returning from Norwich, and 5*l.* was not enough.

*Cur. adv. vult.*

Lord TENTERDEN, C. J. We are of opinion that the rule for a new trial ought to be made absolute. Our opinion is not founded upon the ground that the commissioners were bound to have information on oath before them of the service of the summons, or on the ground that the sum

tendered to the plaintiff was insufficient. We think that neither of those objections ought to prevail; but the ground upon which we think that there ought to be a new trial is, that I ought not to have taken upon myself to decide that the summons which was served on the plaintiff on Monday evening at five o'clock, and by which he was required to attend at Norwich on the following morning at ten, was properly served. We think it was a question for the jury to say, whether, under all the circumstances of the case, the service of the summons was reasonable or not. And in order that that question may be submitted to their consideration, the rule for a new trial must be made absolute.

Rule absolute for a new trial.

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HARROD v. ELIAH WISEMAN BENTON. — p. 217.

The Court will, upon motion, set aside a warrant of attorney, judgment, and execution, on the ground that they are fraudulent against creditors, provided the facts upon which the alleged fraud depends are clearly made out by the affidavits; but where those facts are disputed, they will direct an issue to try the question of fraud.

A RULE nisi had been obtained in this case, calling on the plaintiff and defendant respectively to show cause why the warrant of attorney given to the plaintiff, and the judgment and execution, and all proceedings thereon, should not be set aside, and why the goods taken under such execution should not be sold by the sheriff in satisfaction of an execution issued at the suit of Mary Ann Hill Benton; or, if the same had been sold by the sheriff, why the proceeds thereof should not be paid over for the like purpose, and why the plaintiff or defendant should not pay the costs of this application. It appeared by the affidavits in support of the rule, that Mary Ann Hill Benton had recovered a verdict in the Court of Common Pleas for 60*l.* against the defendant at the sittings after Hilary term, 1828, and had signed judgment on the 28th of April in that year. The plaintiff had also signed his judgment in this Court against the defendant on that day by virtue of a warrant of attorney executed on the 24th of April, but purporting to bear date on the 1st of January. Upon the affidavits on both sides it was a disputed question of fact, whether the warrant of attorney was given to the plaintiff without consideration, and whether the judgment and execution thereon were or were not fraudulent, as intended to anticipate and defeat the levy which it was known was about to be made on behalf of Mary Ann Hill Benton.

*Comyn* showed cause. The Court will not upon motion decide the question whether the warrant of attorney given to the plaintiff and the judgment and execution thereon were fraudulent, this being an application not by the party giving the warrant of attorney, or his representative, but by a stranger, an execution creditor. There is no instance in the books of such an application; that question ought to be submitted to a jury. The plaintiff (M. A. H. Benton) in the second execution, who has obtained the present rule, may indemnify the sheriff, and then the question whether the warrant of attorney was fraudulent may be tried by the present plaintiff in an action against the sheriff for a false return, *Warmoll v. Young*, 5 B. & C. 660; and which is the only legitimate course of proceeding in cases like the present.



*Reader* and *Humphrey*, contra. It must be admitted, that where money deposited with a stakeholder, to abide the event of an illegal wager, remains in his hand, or has been paid over by him after notice that the party desires to rescind the contract, it may be recovered as money had and received by the stakeholder to the use of the party who deposited it. But there is no case, except *Lacaussade v. White*, 7 T. R. 535, in which the money has been recovered, where it had been paid over before such notice was given. Now the decision in *Lacaussade v. White* proceeded upon the mistaken notion that the action was against the stakeholder, and that the money was still in his hands. In *Howson v. Hancock*, 8 T. R. 575, Lord *Kenyon* expressly states that to have been the ground of his former judgment; and in the latter case, the money having been paid over, it was held that it could not be recovered back. [*Bayley*, J. According to my note of *Howson v. Hancock*, it proceeded entirely on the ground that the plaintiff had expressly assented to the money being paid over.] The party to an illegal wager, at the time when he deposits his money, assents to its being paid over to the winner; but there is a *læcus pœnitentiæ*; and if before the money has been paid over he avails himself of that, and desires to be released from the illegal bargain, he can insist upon having his own money returned. Here, however, the plaintiff never repented of the bargain originally made; he never retracted the assent originally given that the money should be paid to the winner, but he asserted himself to be the winner, and on that ground claimed the whole sum deposited. An umpire was appointed to decide that, and according to his decision the money was paid. The cases upon illegal insurances are analogous to this. In a great variety of instances it has been held, that the premium could not be recovered back after the voyage had been performed, although the underwriters would not have been liable on the policy in the event of a loss; *Lowry v. Bourdieu*, 2 Doug. 468, *Andree v. Fletcher*, 3 T. R. 266, *Morck v. Abel*, 3 B. & P. 35, *Vandyke v. Hewitt*, 1 East, 96, *Lubbock v. Potts*, 7 East, 449. Again, the defendant in this case received money to be paid over to the winner; and Wilcoxon being winner might have sued him for it, and the defendant could not in answer have set up the illegality of the contract, *Tenant v. Elliott*, 1 B. & P. 3, *Farmer v. Russell*, 1 B. & P. 296. [*Holroyd*, J. If so, I must have tried which was the winner, but that I was not bound to do.]

BAYLEY, J. I am of opinion that this rule must be discharged. The cases of *Tenant v. Elliott*, and *Farmer v. Russell*, do not prove that the winner of an illegal wager can recover the whole of the stakes from the holder, but only that when the loser has paid the money into the hands of an agent for the winner, the agent cannot set up the illegality against the claim of his principal. Those cases may, therefore, be laid out of consideration; and from all the others which have been cited it appears that there is a material difference between actions by one party to an illegal contract against the other, and those against a stakeholder. If money has been paid upon such a contract by one party to the other, he cannot recover it unless he rescinds the contract while it remains executory. That it may, as between the parties, be rescinded before the event happens, has been established by a variety of cases, *Lubbock v. Potts*, *Vandyke v. Hewitt*, *Lowry v. Bourdieu*, and *Aubert v. Walsh*; nor am I aware of any decision to the contrary, except that of *Lacaussade v. White*, which cannot, I think, be supported; and indeed it appears to have proceeded on the supposition that the defendant was a stakeholder, in which case it would have been right. It is too late now to consider what would have been the best rule on this subject. It might have been proper to say that

the party to a wager on an illegal act, after he had done the act, should not recover his stake. But *Cotton v. Thurland*, followed by *Smith v. Bickmore*, has established that, notwithstanding the event has been decided, and the party has concurred in doing the illegal act, he shall be allowed to recover his own stake. The case of *Smith v. Bickmore* was decided long after the other, and at a time when the distinction had been taken between actions against the party and the stake-holder; and it is now a settled rule that where a wager has been laid on the event of a boxing-match, either party may recover his own stake from the holder. It has been urged that a decision for the plaintiff in the present case would go beyond all former cases, for that the money had been paid over before the action was brought, and the plaintiff had done no act to rescind the wager, nor had ever intimated that he claimed his own money, and that only. But if a stake-holder pays over money without authority from the party, and in opposition to his desire, he does so at his own peril. In *Howson v. Hancock*, the jury found that the money was paid with the assent and concurrence of the plaintiff; the decision, therefore, merely amounted to this, that where money has been paid over with the assent of the party, he cannot get it back. Here, it is true, the whole was demanded: the defendant said he should pay it to the other party; the plaintiff desired him not to do so, and threatened him with an action. That was a plain expression of dissent; the defendant therefore paid over the money at his own peril, and having paid over what could not have been recovered from him, he paid it in his own wrong. Wilcoxon could not have recovered more than his own money, without proving himself the winner, and that could only be established by evidence of his having done an illegal act. He therefore could not have recovered the money, deposited by the plaintiff; and the defendant having paid over the whole after the plaintiff's prohibition, which was valid as to a moiety of the stakes, paid over that moiety wrongfully, and is liable to refund it to the present plaintiff. For these reasons, I think the opinion expressed by my brother *Holroyd* at the trial was correct, and that this rule must be discharged.

*HOLROYD, J.* It appears to me now, as at the trial, that the case of payment to a stake-holder differs from that by one party to the other. The question made at the trial was, whether it was necessary for the plaintiff to rescind the contract. I think it was not; and that he did sufficient by giving notice that he would sue the defendant if he paid over the money.

*LITLEDALE, J.* I am entirely of the same opinion. If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stake-holder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stake-holder there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done.

Rule discharged.

## The King v. The Inhabitants of WAINFLEET ALL SAINTS.—p. 227.

Since the 59 G. 3, c. 50, a settlement may be gained by a residence of forty days in a parish provided the party comply with the conditions mentioned in that act. And, therefore, where a pauper, since that statute, hired land for a year at the sum of 10*l.*, and paid that rent, and occupied the land for the whole year, but resided only forty days in the parish, and not upon the land, it was held, that he gained a settlement.

UPON an appeal against an order of two justices for the removal of B. Markwell, his wife and children, from the parish of Wainfleet All Saints in the parts of Lindsey, in the county of Lincoln, to the parish of Horncastle in the same parts and county, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper, B. Markwell, previously to Lady-day 1822, hired from his wife's mother seven acres of land, situate in the parish of Horncastle, which she then rented at the yearly sum of 8*l.* 1*s.* 6*d.*, and for which the pauper agreed to pay her the same rent, and 3*s.* per week in addition, his tenancy to commence from the ensuing Lady-day. No time was specified for which the pauper agreed to take the land, but he occupied it from the Lady-day before mentioned for three years, and paid the several rents as they became due; and he resided and slept in a house in the same parish (of Horncastle) for upwards of forty days and nights, in the year immediately subsequent to the said Lady-day 1822. The question for the opinion of this Court was, whether this taking, followed by the occupation stated, was sufficient, within the 59 G. 3, c. 50, to entitle the pauper to a settlement in the parish of Horncastle.

*Clarke and Hildyard* in support of the order of sessions. The land was not taken for a year. It is true, that where a yearly rent only is reserved, a yearly tenancy is to be presumed. But here there was also a weekly rent reserved, which of itself would raise a presumption of a weekly tenancy. There is as much reason for presuming the one as the other, and it is incumbent on those who are against the order of sessions, to show that the land was taken for a year. But it could not be hired by the pauper for a year, because his mother was tenant only from year to year, and could not give to the pauper an interest in the land for the year commencing on a future day. Besides the pauper never resided on the land, and only forty days in the parish. Now by the 59 G. 3, c. 50, the legislature has required that the tenement shall be taken and occupied for a year. It must, therefore, have been intended that the tenant should reside for that period in the parish.

*Fynes Clinton*, contra, was stopped by the Court.

BAYLEY, J. The case states that the pauper hired of his wife's mother seven acres of land, which she then rented at a yearly rent, and that he agreed to pay her that yearly rent, and also a weekly rent of three shillings. *Prima facie*, a general hiring must be presumed to be a yearly hiring, *Doe v. Brown*, 8 East, 165, *Doe v. Watts*, 7 T. R. 83; and that presumption is the stronger where the subject matter of the hiring is land, because land varies in its value at different periods of the year. It is said that the mother's estate was determined at the end of the current year, and that she could not, therefore, convey to the pauper an interest for a year commencing on a future day. But the mother was tenant from year to year. She had an interest, therefore, which would continue beyond the year, unless something was done to determine it, viz. unless six months' notice to quit was given. That interest she conveyed to her

son. I think, therefore, that the land in this case was hired for a year. The other objection is, that no settlement was gained, because the pauper did not reside on the land, although he resided in the parish; and, secondly, that he did not reside in the parish for a year. Before the 59 G. 3, c. 50, actual residence in the parish for forty days upon a tenement of the yearly value of 10*l.* conferred a settlement, although the party did not pay any rent for the forty days. But the 59 G. 3, c. 50, altered the law in that respect, and the language of that statute must be abided by as nearly as possible. That statute enacts, that no person shall acquire a settlement in any parish by reason of dwelling for forty days in any tenement rented by such person, unless certain conditions therein mentioned be complied with. It seems, therefore, that residence for forty days will be sufficient to confer a settlement, if the other requisites of the act be complied with. Now it requires, among other things, if the tenement consist of land, that it should be hired and occupied for the term of one year at and for the sum of 10*l.*, and that the rent for that period should be paid. Here all those requisites have been complied with. It does not appear, therefore, to be essential in this case that the pauper should have continued in the parish for the year. It is sufficient that he resided in the parish for forty days, provided he hired and occupied the land in the parish for the year, and paid the rent for that period. The pauper, therefore, gained a settlement in Horncastle, and the order of sessions was wrong.

HOLROYD, J. For the reasons given by my brother *Bayley*, I am of opinion that the land was clearly hired for a year, and that since the 59 G. 3, c. 50, a residence for forty days in a parish is sufficient to confer a settlement, provided the other requisites in that act be complied with.

LITTLEDALE, J., concurred.

Order of sessions quashed.(a)

(a) See *Rex v. Barham*, ante, 99.

DOE, on the demise of CHARLES WAKEMAN LONG, v. HENRY PRIGG.—p. 231.

Devise to A. for life, remainder unto "the surviving children of W. J. and J. W. and their heirs forever; the rents and profits to be divided between them in equal proportions, share and share alike:" Held that the word "surviving" referred to the testator's death, and not that of the tenant for life.

EJECTMENT to recover one seventh share of certain lands in the several parishes of Ripple and Upton, in the county of Worcester, which the lessor of the plaintiff claimed to be entitled to under the will of one W. Shipman. At the trial at the Spring assizes, 1827, for the county of Worcester, the plaintiff was nonsuited, with liberty to move to enter a verdict for the plaintiff, if this Court should be of opinion that he was entitled to recover; and upon that motion being made in the subsequent term, it was agreed that the facts should be stated in the form of a case, as follows:—W. Shipman, being seised in fee of the premises in question, made his will, which was duly executed and attested, so as to pass real property, and bore date the 6th day of February, 1782; and by his will devised the premises in question with others to his mother, for her natural life only; and after the death of his mother to his wife, for her natural life only. He then devised as follows:—"And from and after the decease of my mother and wife, I give and bequeath all the above-

mentioned premises unto the *surviving* children of William Jennings, of Buckley, in the county of Worcester; and of John Warren, of Phelps, in Twining, Gloucestershire, and to their heirs forever; the rents and profits to be divided between them, in equal proportions, share and share alike." He then devised other real property immediately to his wife in fee. The will further contained the following clause:—"And whereas I now stand indebted to Mr. John Jones, of Lulsley Hill, (which said John Jones was the father of the testator's wife,) in a considerable sum of money upon bond; now, if the said Mr. Jones will, at the time of my death, give up the said bond to my executrix hereafter named, (testator's wife,) and not insist upon the payment of the money, all the above devises respecting his daughter stand good; but if he demands payment of the money, it is my will that all the above devises to my wife shall be void and revoked, and she shall have nothing but what was settled on her before marriage. And in that case I give and bequeath unto my mother all the above-mentioned estates, real and personal, for her natural life only; and from and after her decease to the surviving children of W. Jennings aforesaid and J. Warren, and to be divided amongst them as above mentioned."

The testator died in August, 1785, without having altered or revoked the above in part recited will. At the time of the testator's death, there were living his mother and wife, six children of the said W. Jennings, and one child of the said J. Warren, who was a daughter, and afterwards married one Wakeman Long, and was the mother of the lessor of the plaintiff, who was her heir at law, and attained the age of twenty-one years in September, 1823. It did not appear that the said J. Jones ever claimed his debt, and the wife of the testator took the estates and interests given and bequeathed to her by her husband's will, and enjoyed the same until her death. The testator's wife, who was the surviving tenant for life, died in the year 1810. J. Warren's daughter died in the year 1803, and at the time of the death of the testator's wife, in 1810, there were only four children of W. Jennings then surviving. The question for the opinion of the Court is, To what period the words *surviving children* shall refer.

The case was argued, at the sittings after Hilary term, by

*Curwood* for the plaintiff. The expression "surviving children," in this will, refers to the period of the testator's death. If it were not so, the devise to the children would have different effects, according to the determination of the testator's father-in-law as to the bond debt; for if he claimed it, the devise in remainder would take effect on the death of the testator's mother; but if he released it, that devise would not take effect until after the death of the testator's wife. Besides, it is a general rule, that where a remainder can be taken as vested, it shall never be construed as contingent, *Ives v. Legge*, 3 T. R. 488. Here, if the devise to the children is referred to the death of the testator, it will give a vested remainder; but if to the death of the tenants for life, the remainder to the children will be contingent. *Rose v. Hill*, 3 Bur. 1881, is expressly in point. There the testator devised to his wife for life, and after her decease to A., T., M., W. and N., his sons and daughters, and the survivors and survivor of them; and it was held that the words, "survivors or survivor," related to the death of the testator. *Doe v. Lawson*, 3 East, 278, is to the same effect.

*G. R. Cross*, contra. It was said by Sir W. Grant, in *Newton v. Ayscough*, 19 Ves. 534, that the operation of a devise does not depend upon any technical form of words, but upon the apparent intention of

the testator, collected either from the particular disposition, or the general context of the will. Now to refer the words "surviving children," in this case, to the death of the testator, would be an unnatural construction, for it cannot be supposed that he meant to provide for a contingency to happen in his own lifetime; for he might at any time make a new disposition of his property, if any contingency happened to disturb that which had previously been done, *Hawes v. Hawes*, 1 Ves. sen. 14. In *Stringer v. Phillips*, 1 Eq. Ca. Abr. 292, *Rose v. Hill*, and *Doe v. Lawson*, words of survivorship were certainly referred to the death of the testator; but in each of those cases the devise was to certain individuals named, and not to a class, and there were previous words, making the devisees tenants in common, and to avoid the difficulty of reconciling the two parts, the period of survivorship was referred to the death of the testator. But in recent cases the courts have leant against that construction, *Brown v. Bigg*, 7 Ves. 279. In *Hoghton v. Whitgreave*, 1 J. & W. 146, the devise was to the testator's widow for life, and then to certain nephews and nieces, "the survivors or survivor of them;" and these words were held to apply to those who survived the widow. [*Holroyd, J.* There the estate was to be converted from real to personal before it was divided.] In *Cripps v. Wolcott*, 4 Mad. 11, words of survivorship were referred to the period of division and enjoyment, although no change was to be made in the nature of the property.

*Cur. adv. vult.*

BAYLEY, J., now delivered the judgment of the Court. The question in this case arose upon the will of William Shipman, and depended upon the effect of a limitation in remainder to the *surviving* children of William Jennings and John Warren and their heirs. By the will the testator devised to his mother for her natural life only, remainder to his wife for her natural life only, remainder to the surviving children of William Jennings and John Warren, and their heirs forever, the rents and profits to be divided between them in equal proportions, share and share alike; but in a given event he revoked the devise to his wife, and gave to his mother for her natural life only, and from and after her decease to the surviving children of William Jennings aforesaid, and John Warren, and to be divided amongst them as above mentioned. The persons, therefore, coming within the description of "the surviving children," &c., were to take *in possession* in the one case upon the deaths both of the mother and wife, and in the other case upon the death of the mother only. The question is, When they were to take *in interest*, whether they were to take vested estates in remainder immediately upon the death of the testator, or whether their estates were to be contingent till the mother and the wife, in the one case, and the mother in the other, died. There is no doubt but that upon an ordinary limitation by way of remainder to a class, as children, grandchildren, &c., all who are in esse at the time of the death of the testator take vested (and consequently transmissible) interests immediately upon the testator's death, and that all who come in esse before the particular estates end, and the limitation takes effect in possession, are to be let in, and take a vested interest as soon as they come in esse, and that they and their representatives will take as if they had been in esse at the testator's death. This is settled by *Baldwin v. Karver*, Cowp. 309; *Roe v. Perryn*, 3 T. R. 484; *Doe v. Dorvell*, 5 T. R. 518; *Meredith v. Meredith*, 10 East, 503; *Right v. Creber*, 5 B. & C. 866. There is no doubt also but that a limitation by way of remainder to such chil-

dren, &c., as shall be in esse at the time when the particular estate ends, and the remainder is to take effect in possession, is a contingent remainder, because it depends upon the event of any such children continuing in esse until the particular estates end. This is clear from *Roe v. Briggs*, 16 East, 406. Had this devise, therefore, been merely to the children of Jennings and Warren, there would have been no difficulty in the case. It would have fallen within the class of cases to which *Baldwin v. Karver* belongs. The difficulty arises upon the addition of the word *surviving*, and upon the meaning to be given to that word. If this word refers to the time of the death of the testator, all the children who should be living at the testator's death, and all who should come in esse before the life estate ceased, or their representatives, would be entitled, and the interests would vest in every child in esse at the testator's death, and in every one who came in esse afterwards during the continuance of the particular estate. If this word refers to the death of the survivor of the mother and wife in one event, or to the death of the mother in the other, the remainder to the children is contingent, and the only persons entitled will be such children as were living when the wife died. The law inclines to such a construction as will tend to vest a remainder, unless a contrary intention appears, because contingent remainders are in the power of the particular tenant, and may be destroyed; and it is more likely the testator should have intended that the limitations he made should be secure, than that they should be liable to be defeated; but where the intention is clear that the testator meant what would make the remainder contingent, his intention must prevail.

We have endeavored, without success, to find a case exactly circumstanced as this is, where, upon a devise by way of remainder *to a class*, as this is, words of survivorship have been held to apply to the death of the testator; but there are so many in which, upon a devise or bequest *to individuals*, they have been held so to apply, that we think we are warranted in saying that *that* is the right construction in this case. In *Wilson v. Bayley*, 3 Bro. Parl. Ca. 198, where a testator bequeathed certain leaseholds for lives and years for the benefit of his two sons, Mark and John, and their issue; but if they died unmarried and without issue, his will was, that his daughters, Mary, Sarah, and Catharine, and the survivors and survivor of them, and their assigns, should be permitted to receive the rents, &c., as tenants in common, and not as joint tenants, the House of Lords decided that the words of survivorship amongst the daughters applied to the death of the testator, not to the death of the survivor of Mark and John; and that upon the deaths of Mark and John without issue, not only one daughter who survived them, but the representatives of two other daughters, who died before them, were entitled. In *Perry v. Woods*, 3 Ves. 205, where stock was bequeathed in trust for Ann Darby for life, and if she died without children, the executors were to pay the principal to W. and John Pricklow, share and share alike, or to the survivor of them, Sir P. Arden, Master of the Rolls, held, that these words of survivorship applied to the testator's death, not to Ann Darby's; and that though John Pricklow alone survived Ann Darby, he was not entitled to the whole stock, but that the representatives of William were entitled to a moiety. *Roebuck v. Dean*, 4 Bro. Cha. Ca. 403, is exactly similar: 1000*l.* stock, bequeathed in trust to pay the dividends to E. R. for life, and after her decease the 1000*l.* to be equally divided

between five, and to the survivors or survivor of them, and this was held to vest in the five, at the death of the testatrix. In *Maberly v. Strode*, 3 Ves. 450, where land was devised for sale, and the interest of the produce was to be paid to testator's son Samuel for life, and upon his death the principal was to be transferred to his children, if any, otherwise to two nephews and a niece, in equal proportions, share and share alike, issue to take the parent's share, with benefit of survivorship between the nephews and niece: and, upon a question between a nephew who survived Samuel, and the representative of the other nephew and niece, *Arden*, Master of the Rolls, said, "On the blind words, *with benefit of survivorship*, the safest and soundest construction, best warranted by the authorities, most beneficial to the parties, and most likely to have been intended, was to apply them to such as should survive the testator, not to let it remain in contingency, and vest only in such as should happen to survive Samuel, with the chance of the whole being lost, and a total intestacy after the death of Samuel occasioned." In *Edwards v. Symons*, 2 Marsh. 24, 6 Taunt. 213, where lands were devised to trustees in trust, to apply the rents to the maintenance of six younger children, till the youngest, Elizabeth, should attain twenty-one, and on her attaining twenty-one, then to the six, and the survivors and survivor of them, their heirs and assigns forever, as tenants in common, and one of the six survived the testator, but died before Elizabeth attained twenty-one, the Court of Common Pleas certified to the Court of Chancery that he had a share, which at his death descended upon his heir; so that the Court of Common Pleas must have considered the words "the survivors and survivor" as applying to the period of the testator's death, not to the period of Elizabeth's attaining twenty-one. In *Rose v. Hill*, Burr. 1881, which was cited in argument, in *Doe v. Sparrow*, 13 East, 359, and in *Clayton v. Lowe*, 5 B. & A. 636, words of survivorship were referred to the period of the testator's death, not to any ulterior time in the case of devises of land; and in Lord *Bindon v. Lord Suffolk*, 1 P. Wms. 96, and other cases in Chancery, they have been referred to the same period upon personal bequests.

In many, indeed, if not in most of these cases, this has been a necessary construction, because the devises or gifts were not to a class, but to individuals; they were to take as tenants in common; there was no specific definite period but the testator's death to which the words of survivorship could apply; and it would have been inconsistent with the tenancy in common to have applied them to any later period; but that objection does not apply to the cases of *Wilson v. Bayley*, *Perry v. Woods*, *Maberly v. Ströde*, and *Edwards v. Symons*, because in the first three, there was the alternative between the testator's death and the death of the tenant for life; and in the last, between the testator's death and the youngest child Elizabeth's attaining twenty-one. And the testator's death is in this case so much the more rational period, so much the more likely to have been intended, and falling in, as it does, with the rule of law for vesting estates as soon as they may, instead of leaving them contingent, that we are of opinion that the estate here vested in remainder, immediately upon the testator's death, in the then children of Jennings and Warren; and that upon the deaths of those who died after the testator, and before the testator's widow, their sevenths descended upon their respective heirs at law; and, consequently, that the lessor of the



plaintiff is entitled to recover one seventh. A verdict, therefore, must be entered accordingly, and the *postea* delivered to the plaintiff.

I have not entered into a detailed examination of the cases cited for the defendant, because no one of them is in point; none of them bear closer upon this case than *Wilson v. Bayley*, and the other cases I have stated; and, as far as they differ from these cases, we think these cases preferable.

*Postea* to the plaintiff.

The KING v. The Inhabitants of BROMYARD. — p. 240.

On the hearing of an appeal against a poor-rate, the sessions have no jurisdiction to quash the rate for a defect appearing on the face of the rate itself, unless that defect be specified in the notice as a cause of appeal.

UPON appeal by E. West, against a rate or assessment, made for the relief of the poor of the township of Bromyard, in the county of Hereford bearing date the 9th of November, 1827, the sessions quashed the rate with 10s. costs, to be paid by the respondents, subject to the opinion of this Court on the following case:—

The particular grounds of appeal stated and specified in the notice of the appellant were only, “that he was over-rated in the said rate, or assessment in respect of the yearly value of the lands and tenements for and in respect of the occupation of which he was assessed or charged in the said rate or assessment; and also that no part, or a very small part only, of the lands and tenements in respect of which he was assessed and rated in the said rate or assessment, was situate in the said town; and also that he did occupy no rateable property, or rateable property to a much less amount than that for which he was so rated and assessed in the said rate.” On the rate in question being produced, it appeared to be entitled “An assessment made upon the several occupiers of lands, tithes, and hereditaments in the town of Bromyard, in the county of Hereford, of 1s. in the pound for the necessary use of the poor and other purposes relative to the acts of parliament, granted at a committee meeting the 9th day of November, 1827, by T. B., clerk, and C. S. L., dean, of St. Asph, two of his Majesty’s justices of the peace in and for the said county of Hereford.” The property in respect of which the appellant and several others were rated was specified, but the property in respect of which the majority were rated was not stated, the names of the persons and the sums only being inserted. It was contended, that the court of quarter sessions ought not to examine or inquire into this objection to the rate, or to take notice of it, as it was not specifically pointed out by the notice of appeal. The sessions, however, determined otherwise, and on this objection quashed the rate, subject to the opinion of this court.

*Justice* in support of the order of sessions. The rate in this case was illegal, and void on the face of it, because it did not specify the property in respect of which the assessment on each individual was made, *Rex v. Air and Calder Navigation*, 2 B. & C. 718. The sessions, therefore, were bound upon inspection of the rate itself to quash it. It is true that the statute 41 G. 3, c. 28, s. 4, prohibits the justices from examining or inquiring into any other cause of appeal than those mentioned in the notice. But the examination and inquiry there mentioned import an investigation of the cause of appeal by extrinsic evidence. Here the defect in the rate appeared upon inspection, and no examination or inquiry by extrinsic evidence was necessary to enable the justices to quash the rate. *Campbell*, contra, was stopped by the Court.

BAYLEY, J. There can be no doubt that it ought to appear on the face of the rate in respect of what property the assessment is made upon each individual charged in the rate; and if the omission of that statement had been pointed out by the notice as one of the grounds of appeal, it would have been a sufficient ground for quashing the rate. In many instances the specification of the property in respect of which the assessment is made will give no further information to the parties to be affected by the rate than the fact of their having been rated at a specific sum. But still the party rated has a right to know in respect of what property he is rated, in order that if he is over-rated in respect of that property he may appeal. If, however, he be satisfied with the amount of the sum for which he is rated, he will not appeal, because it will not be his interest to have the rate corrected. By the stat. 41 G. 3, c. 23, the legislature intended to limit the expense of appeals, and to lessen the labour of the justices at sessions. By the fourth section it is enacted, "that all notices of appeal against any rate shall be in writing, &c., and that the particular causes or grounds of appeal shall be stated and specified in such notice; and upon the hearing of any appeal from or against any such rate, the court of general or quarter sessions to which such appeal shall be made shall not examine or inquire into any other cause or ground of appeal than such as are or is stated and specified in the notice of appeal." Now, suppose there were no notice of appeal whatever, could the sessions quash the rate upon the ground that it was bad for a defect apparent on the face of it? Clearly not. Or could the sessions quash the rate for such a defect, if a general notice of appeal were given, without specifying any cause? They certainly could not; because the statute prohibits their inquiring into any causes of appeal except those mentioned in the notice. For the same reason they cannot, in a case where certain causes of appeal are specified in the notice, go into others not specified. It is said that the words "examine and inquire" are applicable to those cases only where extrinsic evidence is required to show the defect in the rate, and not to cases where the defect appears on the face of it. But we should not do justice to the intention of the legislature if we entered into so very critical an examination of the language of the act. When the language of a deed is made the subject-matter of discussion, in order thereby to ascertain its legal effect, it may be said to be the subject of examination and inquiry. It has been said that this rate is illegal and void on the face of it, because the property in respect of which the assessment is made is not specified. I am of opinion that it is not illegal and void on that ground, unless that be pointed out as a specific cause of appeal in the notice. That is one ground of objection which will render the rate liable to be quashed. But if no objection be made on that ground it will be good. In *Rex v. Air and Calder Navigation*, 2 B. & C. 713, the objection was specifically pointed out in the notice of appeal.

HOLROYD, J. It seems to me that the sessions had no jurisdiction to consider this objection, unless it was specified in the notice as a ground of appeal. They had no jurisdiction whatever over the rate, unless the notice required by the statute was given, except in the case provided for by the fifth section, whereby it is enacted, "that by consent of the overseers and of other persons interested the Court may proceed to hear and determine the appeal although no notice have been given, or upon grounds of appeal not stated or mis-stated in such written notice where any notice shall have been given in writing." It has been argued that the words "examine and inquire" are to be construed more narrowly than their

natural import warrants, and the object of the legislature seems to require. The fourth section requires that all notices of appeal shall be given in a particular manner, and that the particular causes or grounds of appeal shall be specified in the notice. So far that section is directory, but in what follows, it is not merely directory but prohibitory. It goes on, "and upon the hearing of any appeal from or against such rate, the court of quarter sessions *shall not examine or inquire* into any other cause or ground of appeal than such as are stated and specified in the notice of appeal." Construing this clause according to the natural import of the words used, I think that it means, that the sessions shall not enter into any other causes of appeal than those specified in the notice; but assuming the meaning of the words "examine or inquire" to be doubtful, I think we ought to put upon the clause that construction which will have the effect of preventing "the quashing of rates," the inconvenience mentioned in the recital, which it was the object of the statute to remedy; and construing the clause with reference to that object, I think that the sessions had no power to enter into any other causes of appeal than those stated in the notice; and that being so, I think that we must hold that the sessions had no jurisdiction to quash the rate upon the ground that the property in respect of which the assessment was made was not described, because that was not specified in the notice as a cause of appeal.

LITTLEDALE, J. By the statute of the 43 Eliz. c. 2, the rate was to be made upon every inhabitant in respect of certain descriptions of property. The property in respect of which individuals are assessed ought, therefore, to be specified in the rate for two purposes: first, that the parties rated may see whether they have the property, and that it is the subject of the rate; secondly, that other persons may see whether the rate be equally assessed. If the property be not specified, the rate is defective and informal, and that informality is a ground of appeal, provided it be made the subject of appeal by giving the required notice. The 41 G. 3, c. 23, s. 4, says, that the sessions shall not examine or inquire into any other cause of appeal than such as are specified in the notice. It is true that in this case there was a defect on the face of the rate itself, which would, therefore, appear on inspection. But if neither the person whose property is omitted, nor others who have an interest that the rate should be equal, make the omission of such property a ground of complaint, the justices have no jurisdiction to quash the rate on that account. I think that the words "examine or inquire" apply to an examination by inspection as well as by extrinsic evidence. The word *examine* is frequently used in the same sense as the word *inspect*. Thus the statute 27 Eliz. c. 5, which gives the writ of error from the Court of King's Bench to the Court of Exchequer Chamber, enacts, that the record may be removed into the Exchequer Chamber, there to be *examined* by the justices and barons, and they are to have full powers to *examine* all such errors as shall be assigned. Now, when error is assigned upon matter of law, it appears upon the face of the record, and whether there be good cause of error or not is ascertained by inspection of the record, and not by extrinsic evidence. So in the statute of the 31 Edw. 3, c. 12, which gives the writ of error from the law side of the Exchequer to the Chancellor and treasurer, the word *examine* is used in the same sense. I therefore think that the justices at sessions could not properly take notice of this objection to the rule.

Order of sessions quashed.

## The KING v. The Inhabitants of LOUTH.—p. 247.

An indenture, by which an apprentice was bound for seven years, to serve A. B. for the first four years, and his own father for the last three, to learn two different trades, is a valid indenture, and requires only one stamp.

UPON appeal against an order of two justices, whereby B. Furnish, his wife and children, were removed from the parish of Louth, in the parts of Lindsey in the county of Lincoln, to the township of Baildon, in the parish of Ottley in the West Riding of the county of York, the sessions discharged the order, subject to the opinion of this Court on the following case:—

The pauper, B. Furnish, being legally settled in the township of Baildon, in the county of York, was in the year 1780 bound apprentice by indenture, upon which there is only one 5s. stamp (and of which the following is a copy), duly executed by all parties, to his father, Thomas Furnish a wool-comber, and to J. Grozer a weaver, both then residing in the township of Leeds, in the county of York, but not copartners.

“This indenture, made the 1st day of January, 1780, between John Grozer of the parish of Leeds, in the county of York, weaver; and T. Furnish, wool-comber, of the one part, and B. Furnish, of the parish aforesaid, of the other part; witnesseth, that B. Furnish hath of his own free will and with the consent of his parents put and bound himself apprentice to and with the said J. Grozer and T. Furnish, and with them after the manner of an apprentice to dwell, remain, and serve from the date hereof, for, during, and until the term of seven years thence next following be fully completed and ended.” There then followed the usual covenants by the apprentice, well and faithfully to serve his masters; and also covenants by Grozer, that he and T. Furnish should teach the apprentice the trade of stuff-weaving and wool-combing, and that Grozer should provide the apprentice meat, drink, washing and lodging, for the first four years, and work during that period; and that the apprentice should serve the latter three years with T. Furnish; and that Grozer should be absolutely free from the apprentice at the end of four years from the date of the indenture. The pauper served and resided under such indenture at Leeds for four years and three months, and then removed to Louth.

*Hildyard* and *Whitehurst*, in support of the order of sessions. This is a valid indenture, although it be unusual in its form. The object of the contract of apprenticeship being, that the apprentice shall be taught, and be subject to a proper control for a certain period, may be attained as well by binding him to two masters in succession, to learn two trades of them, as by binding him to one master to learn one trade. There is no objection on principle to such an indenture; nor is it void because it has but one stamp. *Rex v. Reeks*, Ld. Raym. 1445, will be relied on by the other side. There a statute directed that there should be a certain stamp on every piece of vellum on which any admission into a corporation should be engrossed; and it was held, that the admission of several persons could not be engrossed on the same piece of vellum, unless it had as many stamps as there were admissions. But in that case the stamp duty was imposed on the piece of vellum. Here it is imposed on the indenture, and there is but one indenture. So, where a number of persons severally bind themselves in a penalty by one bond, conditioned for

the performance by each and every of them of the *same matters*, it was held, that such bond required only one stamp; *Bowen v. Ashley*, 1 N. R. 274. So, where a lease contained several distinct demises at distinct rents, it was held that it might be stamped according to the aggregate of the stamps required for the several demises; *Boase v. Jackson*, 3 B. & B. 185. So an agreement by several subscribers to a common fund, *Davis v. Williams*, 13 East, 282, or of reference by several underwriters of a policy, *Goodson v. Forbes*, 6 Taunt. 171, or an assignment of the prize-money of several seamen on board a privateer, payable out of the same fund, *Baker v. Jardine*, 13 East, 285 n., requires but one stamp.

*N. R. Clarke* and *Fynes Clinton*, contra. The instrument in question operates either as two distinct indentures or as an indenture and assignment, and in either case two stamps are necessary. It has all the effect of two indentures, for there are two bindings to two different masters, and each of them contracts to instruct and find the apprentice with provisions. It is clear that they are two distinct bindings; because the first master was to be "*absolutely free*" of the apprentice at the end of four years; and the second master had no control over him, or power of requiring his services, nor was he under any liability to take him, till the end of the four years. At all events, this instrument has all the effect of an indenture, binding the apprentice to the first master, and of an assignment by him to the second. The two masters acquired by the indenture two distinct interests in the apprentice, and in that respect this case is distinguishable from the cases cited on the other side. In those cases the several parties had a community of interest.

BAYLEY, J. It was once supposed that the effect of the statute of the 5 Eliz. c. 4, was to avoid all indentures by which the apprentice was bound for any period less than seven years. The effect of that statute is that certain benefits result from an apprenticeship for seven years, which do not obtain in other instances. But it has been decided that indentures binding for a shorter period are not void, but voidable only, if the parties themselves think fit to take advantage of it, and, therefore, a binding for four years has been held to confer a settlement. It seems to me that this is a valid indenture, and sufficient for the purpose of constituting an apprenticeship for seven years. In ordinary cases the party is bound for seven years to serve one master and to learn one trade. But the knowledge of one trade may materially assist him in learning another, and it may be for the benefit of the apprentice that he should learn two trades, and it may be desirable to contract with two masters to teach him both their trades. Suppose the father of the apprentice to have been desirous to bind his son so that he might acquire the best information in two trades, and be under proper control for the whole seven years: it was not unreasonable, in the first instance, that he should make a bargain with two different persons that his son should be taught two different trades; that he should serve one master for four years in order to learn one trade, and the other three years to learn the other trade. The father, perhaps, may have found it difficult to get one master to take his son for seven years, and may have found one willing to take him for four, provided, in the first instance, he bound himself to take the apprentice at the end of four years, when his term with the first master was to expire. And if that was the agreement originally made between the parties, then at the expiration of the first four years the second master, who in this instance was the father of the apprentice, would not take the apprentice by assignment, but by virtue of the indenture. It seems to me that it

was reasonable to make a stipulation, in the first instance, that the apprentice should be bound during the seven years to the two masters to learn two trades, and that that stipulation may be considered to be incorporated in the indenture. The whole was one transaction, and the indenture, therefore, required only one stamp. The order of sessions must, therefore, be confirmed.

HOLROYD, J. I am of the same opinion. The object of the contract of apprenticeship is, that the apprentice shall be taught for a certain period. The usual practice is to bind the apprentice for seven years to one master for the purpose of being taught one trade. It will be a good contract of apprenticeship if the apprentice be bound to two masters successively to learn two different trades. And I think such an indenture having only one stamp is not avoided by any provision of the stamp-act, unless it be shown that the parties, when they adopted that particular form of indenture, thereby intended to evade the payment of duties which by law they otherwise would have been bound to pay. Unless that be shown, I think we should construe the indenture so as not to avoid it. Now if it was *bonâ fide* agreed between the father and the first master, with a view that his son should have all the benefits of serving a seven years' apprenticeship, that he the father should take the son at the end of the first four years, he would take him under the indenture, and no new stamp would be necessary. The duty is imposed upon every indenture, and not with reference to the number of masters whom the apprentice is to serve, or the number of trades he is to learn. No fraud being found, I think there was but one binding and one indenture. There may have been two bindings in one sense, so far as the masters were concerned, but so far as the apprentice was concerned there was but one; he was bound by one indenture to serve one master for four and another for three years.

LITLEDAL, J. I think the stamp in this case is sufficient. Suppose that before the statute of 5 Eliz. c. 4, a parent, intending that his son should learn two trades connected with each other, as those of a woolcomber and weaver are said to be in this case, or two trades entirely unconnected with each other, had agreed with two several persons that one of them should teach his son one trade, and the other another trade, there clearly would be no objection at common law to the two persons taking the apprentice successively, and teaching him their respective trades. The statute of 5 Eliz. c. 4, confers certain privileges on persons who serve an apprenticeship for seven years. But it has been decided that it does not render void all other contracts of apprenticeship. Independently of the stamp-act, this indenture is therefore valid. But by that statute the legislature have required that a duty shall be paid on every indenture, not that a distinct duty shall be paid in respect of each master the apprentice is to serve, or each trade he is to learn. Here the duty required by the act has been paid on the indenture. I think that this instrument does not operate as two indentures, or as an indenture and assignment, so as to require two stamps. There was no intention to evade the payment of the stamp duties. And as this would be a good indenture at common law, and is not avoided by the statute of Elizabeth, and as the parties might have entered into the engagement at common law by one indenture, I cannot say that it operates as two. It has not the effect of two bindings, but relates to one transaction, the feeding and teaching of one apprentice. I think, therefore, that it operates as one binding. And if it was originally agreed between the father and the

first master that the former should take the apprentice at the end of the first four years, he took the apprentice by virtue of the indenture, and not of an assignment.

Order of sessions confirmed.

The KING v. The Justices of WORCESTERSHIRE.—p. 254.

In an order of justices for stopping up an unnecessary highway under the 55 G. 3, c. 68, it must be stated that it appeared to the justices, *on view*, that the way was unnecessary; and, therefore, an order, merely stating that the "justices had, upon view, found, or that it appeared to them," that the way was unnecessary, is bad.

AN order of justices for stopping up a highway stated as follows:—  
"We, the undersigned W. H. and W. V., two of his Majesty's justices of the peace, having upon view found, or it having appeared to us, that part of a certain public bridle-road and public highway, &c. (describing the road), is an useless and unnecessary public highway, do order that the said part of the said public bridle-road and public highway henceforth be stopped up." This order having been confirmed at the quarter sessions, *Coltman* obtained a rule nisi for a certiorari to remove into this court the original order, and the order of sessions confirming the same, on the ground that it did not appear on the face of the order that the justices had any jurisdiction to stop up the road in question, inasmuch as the statute 55 G. 3, c. 68, gave the justices power to stop up unnecessary roads upon *view* only; and here it did not appear whether the justices had had any view.

*Taunton* and *Shutt* showed cause. It is quite clear that the magistrates must have intended to convey the meaning that they had had a view, and every intendment ought to be made in favour of an order of justices. The words "upon view" govern the whole sentence, and apply as well to the words "having found" as to the words "it having appeared." In substance they have the same import as if the justices had said, "it having appeared to us on view." In furtherance of the manifest intention of the justices the words "upon view" may be transposed. It is immaterial whether they precede or follow the participle. Supposing the words were transposed, "we having found," or "it having appeared to us *on view*," or suppose the words *on view* to have been repeated, there could then have been no doubt as to the meaning of the order.

BAYLEY, J. It seems to me quite clear that this order cannot be supported. The 55 G. 3, c. 68, s. 2, enacts, "that where it shall appear on the view of any two or more justices of the peace that any public highway, bridle-way, or footway is unnecessary, it shall be lawful by order of such justices, or any two of them, to stop up such unnecessary highway," &c. The justices have no jurisdiction to stop up the highway unless they pursue the power given to them by the legislature. The act says they may on *view* take away the right of the public to pass along the highway. The justices, therefore, ought to show on the face of the order that they have had a view, and that it had appeared to them *on view* that the highway was unnecessary. They ought either to use the words of the act of parliament, or other words of equivalent import. They have not by this order shown that they had a view, and that upon such view they found the highway to be unnecessary. We must construe the words used by them according to their plain and natural import in the order in which they stand. So construing them, they say, "they had upon view found,

or it had appeared to them, that part of the highway was unnecessary ;" or, in other words, that they had done that which the legislature required, or something else. That being so, I cannot say that upon the face of the order it appears that the justices had jurisdiction. The rule for a certiorari must, therefore, be made absolute.

LITLEDALE, J. The justices might perhaps stop up an unnecessary highway under the 13 G. 3, c. 78, s. 22, without having had a view. For there the words are, "where it shall appear to the justices who are hereby authorized to view or inquire into the same;" but the 55 G. 3, c. 68, s. 2, makes it necessary that it should appear upon view to the justices. Here the order does not show that the justices had a view.

Rule absolute.

Sir *James Scarlett* and *Coltman* were to have argued in support of the rule.

### CUBITT v. PORTER. — p. 257.

The common user of a wall separating adjoining lands belonging to different owners, is prima facie evidence that the wall, and the land on which it stands, belong to the owners of those adjoining lands in equal moieties as tenants in common.

Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one; it was held, that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other.

DECLARATION stated that the defendant on, &c., at, &c., broke and entered a certain close of the plaintiff, to wit, in the city of Norwich, and county of the same city, and then and there pulled down and damaged a great part of a certain wall of the plaintiff, then standing and being in and upon the said close, and the materials thereof, of the plaintiff, of the value of 100*l.*, seized, and carried away, and converted, and disposed thereof to his, the defendant's, own use; and also erected and built a certain other wall, and a certain privy, and a certain other erection and building against and upon the wall of the plaintiff, and kept and continued the same other wall, &c., upon and against the wall of the plaintiff for a long space of time, and also cast divers quantities of bricks and rubbish upon the plaintiff's close, by means of which several premises the wall of the plaintiff had been and was greatly weakened and injured, &c. Plea, not guilty. At the trial, before *Alexander*, C. B., at the Summer assizes for the county of Norfolk, 1826, it appeared that the plaintiff was the occupier of a cottage and garden, as tenant to one Mr. Doman. They had formerly been the property of the plaintiff's father. The defendant was the owner of premises adjoining those occupied by the plaintiff, and separated therefrom by a wall, part of which the defendant, in July, 1825, had pulled down, and erected on the site of it another wall, (of a greater height than the old wall,) with a cottage and other buildings against it; and the present action was brought, after the new wall had been rebuilt, to try the right of property in that wall. There was evidence on both sides of various acts of user of the wall by the respective owners of the plaintiff's and defendant's premises. The Lord Chief Baron, upon this evidence, told the jury to find for the defendant, if they thought the wall was his, or if, from the common user of the wall by the respective owners of the plaintiff's and defendant's premises, they believed the plaintiff and defendant had a common property in it. The verdict returned by the foreman of the jury was, "We find this to be a party wall." The Lord Chief Baron said, That is a verdict for the defendant. After the jury had separated,



the plaintiff's counsel observed, that the wall might be a party wall, and yet the plaintiff and defendant might not be tenants in common of it, or of the land on which it was built; for if each of the proprietors of the two estates contributed the site of the land on which it was built in equal moieties, or had contributed in the same proportion to the expense of building it, each of them would remain the owner of a moiety of the wall, and might maintain an action against the other for any injury done to that moiety. *Storks*, Serjt., in Michaelmas term, 1826, obtained a rule nisi for a new trial, upon the ground, first, that the attention of the jury had not been drawn to that distinction, and that it might, therefore, be true that the wall was a party wall, and yet this action would be maintainable. Secondly, assuming that the verdict established that they were tenants in common of the wall, and of the land on which it was built, still the action was maintainable, because there had been a destruction of the subject-matter of the tenancy in common by one of the two co-tenants.

*Robinson* and *Wallinger* now showed cause. The jury having found this to be a party wall, in answer to the question submitted to them, whether it was the common property of the plaintiff and defendant, the verdict was properly entered for the defendant. In *Matts v. Hawkins*, 5 Taunt. 20, where there had been a common user of a wall by the owners and occupiers of adjoining premises for a considerable period of time, but the wall was proved to have been built at the joint expense of the two, and the land on which it was built to have been contributed in equal moieties; it was held that they were not, therefore, tenants in common of the wall, or of the land on which it stood. But in this case it did not appear at whose expense the wall was built, or that the land had been contributed in equal moieties. The reasonable presumption arising from the common user, therefore, was, that the wall and the land on which it stood belonged to the owners of the two estates as tenants in common, *Wiltshire v. Sidford*.(a) Besides the mode in which the question was submitted to the jury was not objected to at the trial, nor was any observation

(a) WILTSHIRE v. SIDFORD. *Michaelmas*, 8 G. 4.

This was an action of trespass. The cause was tried before *Burrough*, J., at the Spring assizes for the county of Wilts, 1827. The plaintiff was the owner of a house at Wilton, and the defendant the owner of an adjoining house, which he pulled down and rebuilt, and he built upon and against a wall dividing the former premises, and which the plaintiff claimed as being his sole property. There was contradictory evidence as to the former state of the plaintiff's premises, and conflicting opinions of surveyors from the existing state of the defendant's premises, as to there having been two existing walls, or only one, and as to the wall having been originally the exterior wall of the plaintiff's premises before the defendant's premises had been built. The learned judge told the jury, some of whom had had a view, that if they were satisfied that there had been originally but one wall, and that it had been jointly used by the owners of both the premises for nearly a century, the date of the defendant's building, he was of opinion, that the action was not maintainable, and he left it to the jury to say, whether it was a party wall or not. The jury said they considered it to be a party wall, and found a verdict for the defendant. A rule nisi for a new trial was obtained, principally upon the ground, that the verdict was against evidence. Upon the reading of the report, the Court called upon the counsel for the plaintiff to support the rule. They relied on *Matts v. Hawkins*, 5 Taunt. 20, to show, that it did not necessarily follow from the fact of the wall being a party wall, that the plaintiff and defendant were tenants in common.

The Court distinguished this case from *Matts v. Hawkins*, where the quantity of land which each party contributed was known; and said, where that was not known, the reasonable presumption, from the common use of the wall, was prima facie, that the wall and the land on which it was built, were the undivided property of both. They, therefore, thought the verdict right, and discharged the rule.

Rule discharged

made upon the terms in which the verdict was found, until after the jury had separated. Secondly, assuming it to be established that the parties were tenants in common of the wall and of the land on which it stood, then this action was not maintainable, because one tenant in common cannot maintain trespass against another. There had not been a total destruction of the subject-matter of the tenancy, but a temporary removal of it, with the intention of promptly reinstating it in a more perfect state. One tenant in common can only maintain trespass against the other where there has been an entire destruction of the thing held in common; as if the whole flight of doves be destroyed by one of two tenants in common of a dove-house; or all the deer by one of two tenants in common of a park. In this case, before the commencement of the action, the wall had been rebuilt. At the time, therefore, when the action of trespass was brought, the subject-matter of the tenancy in common was not destroyed.

*Storks, Serjt., and F. Kelly, contra.* The plaintiff as well as defendant claimed the whole property in the wall. Neither of them contended that there was a tenancy in common of the wall, or of the soil on which it stood. That view of the subject was first taken by the Lord Chief Baron, and he left it to the jury to find for the defendant, if they thought from the user of the wall that the plaintiff and defendant were tenants in common. They found it to be a party wall. Now if the two proprietors of the premises had contributed jointly to the expense of building the wall, and in equal moieties the land on which it was built, there would have been the same common user, and yet they would not have been tenants in common of the wall, or of the soil on which it was built. *Matts v. Hawkins*, 5 Taunt. 20. There was no evidence of any tenancy in common of the land on which the wall was built, or even of the wall itself. But, secondly, assuming that the plaintiff and defendant were tenants in common of the wall and of the land on which it stood, trespass was maintainable, because there had been a total destruction of the wall, which was the subject matter of the tenancy in common. Co. Litt. 200 a. Among several instances there stated where trespass will lie, is the following: "If two tenants in common be of land and of mete stones, pro metis et bundis, and the one take up and carry them away, the other shall have trespass." That shows trespass will lie for even a temporary removal of the mete stones, the tenant in common being wholly deprived of the use of them during such removal. In Litt. s. 322 it is laid down, that if two have an estate in common for term of years, and the one occupy all, and put the other out of possession and occupation, the latter may maintain ejectment. Here there was evidence of an actual expulsion. For the defendant pulled down the old wall, and thereby deprived the other of the use of it for a time. Before the new wall was built, the plaintiff was wholly deprived of the use of the wall. That was an expulsion.

BAYLEY, J. I am of opinion that the rule for a new trial ought to be discharged. This was an action for pulling down the plaintiff's wall. If the wall was the exclusive property of the plaintiff, then the act done by the defendant was a sufficient ground for the action. If it was entirely the property of the defendant, then he was justified in doing what he did. There was a third view of the case, and that was the view taken of it by the Lord Chief Baron at the trial, viz., that it might be the common property of the plaintiff and defendant. The question left to the jury was, whether from the common use of the wall they would not infer that

it was common property. Now, there was certainly very strong evidence of common use, and the nature of the right may be collected from the manner in which a thing has been used. The jury found that it was a party wall; they did not in terms find that it was common property; but on having the question whether it was common property put to them, they found it was a party wall. The Lord Chief Baron observed, this was a verdict for the defendant. Until the jury had separated, no observation was made upon the subject of the direction of the Judge, or upon the answer of the jury on that point. And I think it is too late, on a motion for a new trial, to suggest that the case might have been differently presented to the consideration of the jury; and that if that had been done, the verdict might have been different. The probability is against the existence of that state of things which would have justified a verdict for the plaintiff, even on that view of the case, which was not presented to the consideration of the jury. Where a wall is common property, it may happen either that a moiety of the land on which it is built may be one man's, and the other moiety another's, or the land may belong to the two persons in undivided moieties. It does not appear whether, at the time when this wall was built, the land belonged wholly to one individual. It might at that time have belonged entirely to one, and then he might have sold off a part; or he might have sold an undivided moiety of the wall with the land on one side, and an undivided moiety of the wall with the land on the other side. If the land on which the wall was built belonged on one side to one party, and on the other to the other party, and they between them agreed to build the wall, it would have been prudent at least to make this bargain, that so long as there was to be a wall continuing on this property, the land on which it was built, and the wall which stood upon that land, should be taken and considered to be the common property of the two, and that the owners of the estates on each side should be tenants in common of the undivided moiety of that land and of that wall; with the power of adopting such remedies for partition as tenants in common may adopt. On the other hand, if the wall stood partly on one man's land, and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two. It seems to me, the probability of the case is, that this was not a party wall according to the principle which was acted upon in the case of *Matts v. Hawkins*, 5 Taunt. 20, but that it was a wall built on the common property of the two, and that the wall was the common property of both. *Matts v. Hawkins* naturally led to a different conclusion; for under the party-wall act, each is to contribute the land for that which is to be built on the common soil of the two. If the land is to be contributed by the parties in equal proportions, it may be a probable consequence (I do not say whether it is or not) that the wall belongs one half to one, and the other half to the other; but that, as it seems to me, in the country where the party-wall act does not apply, is such an improbable state of things, that we ought not to send it down again to a new trial, on the ground that that view of the case was not presented to the consideration of the jury, when at the trial it was not desired by the counsel that it should be so presented to them.

Then, the next point is, whether, assuming that the land on which this wall was built, and that the wall itself was the common property of the two, the act done by the defendant entitled the plaintiff to maintain tres-

pass. It has been contended that trespass is maintainable, on the ground that there was a destruction of the thing, and that if one tenant in common destroy that which is the subject of the tenancy in common, that is an actual ouster and expulsion by the one of the other, and that the party so expelled may maintain an action of trespass for what has been done in that respect. Perhaps, if one had entirely destroyed the wall, that might have been a foundation for an action of trespass. But I take it, that in the case of a wall, a temporary removal, with a view to improve part of the property on one side at least, and, perhaps, on both, is not such a destruction as will justify an action of trespass. There is no authority to show that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction; the object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made. But then it is said the wall here is much higher than the wall was before. What is the consequence of that? One tenant in common has, upon that which is the subject-matter of the tenancy in common, laid bricks and heightened the wall. If that be done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy he can have. If there be land belonging to two as tenants in common, and one builds a wall on that land, the other cannot bring trespass, because he is excluded from the surface of that ground for a certain period of time, viz., for so long a period as that wall stands. This case falls within the principle acted upon in *Wiltshire v. Sidford*, ante, 212. The view in which it was presented to the jury by the Lord Chief Baron was the right view of it. There was evidence of a common user by both parties, which justified the presumption either that the wall was originally built on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense; or that it had been agreed between them that the wall and the land on which it stood should be considered the property of both as tenants in common, so as to insure to each a continuance of the use of the wall. For these reasons I am of opinion that this rule ought to be discharged.

HOLROYD, J. I am of opinion that this rule ought to be discharged. It is incumbent on the plaintiff to establish his right of action. The declaration in this case was for pulling down the old wall and building the new one. The presumption arising from the acts of enjoyment is, that the wall was the property of the plaintiff and defendant as tenants in common; for the law will presume that what was done without opposition for a considerable time was done rightfully, and that these acts of enjoyment were lawful. That being the case, there was abundant evidence upon the trial to raise a question to go to the jury, whether the wall was or was not the common wall of both. There having been a joint use of the wall by both, each must have had the right originally, or have acquired the right in the course of time by legal means. The jury have found in effect that it was their common property. The question then arises, Whether one tenant in common can maintain an action of trespass against another for such acts as were done in this case by pulling down the old wall and building the new one on its site. Taking it to be the

law, that where there is a complete destruction by one tenant in common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, I think the act done by the defendant in this case cannot be considered as a destruction of the wall; the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible.

LITTLEDALE, J. I am entirely of the same opinion. The plaintiff seems to have claimed the wall as his own exclusive property, and so did the defendant. There was abundant evidence to raise the question for the consideration of the jury, Whether the plaintiff and defendant were tenants in common. It is suggested, that although the learned Judge left it to the jury to find whether the wall was the property of the plaintiff or of the defendant, and also whether it was the common property of both as tenants in common, yet that the foreman of the jury, when he returned the verdict, did not in express terms answer the question put to them by the learned Judge, but said that the jury found it to be a party wall; and that that finding is consistent with the fact of the wall, and the soil on which it was built, having originally belonged to the plaintiff and defendant, or those under whom they claimed, in equal moieties. It appears that, when that verdict was returned, the Lord Chief Baron observed that it was a verdict for the defendant. The plaintiff's counsel did not then suggest to the Lord Chief Baron the propriety of leaving to the jury the question in any other form than that in which it was left to them, or intimate any doubt as to the sufficiency of the evidence to warrant the jury in coming to the conclusion to which they did come. That being so, a new trial cannot now be granted on that ground. But even assuming the parties to have been tenants in common of this wall, then it is said that trespass will lie in this case by one tenant in common against the other, because there was in this case a destruction of the subject-matter of the tenancy in common. In Com. Dig. Estates, (K. 8,) there are various cases as to the remedy which one tenant in common has against another. It appears that with regard to actions in respect to matters not chattels, in some cases an ejectment will lie, if one actually oust his companion of the possession, and trespass will lie where there has been a complete and total destruction of the subject-matter of the tenancy in common; as, if one tenant in common destroys the whole flight of a dove-cot, or all the deer in their park. In other cases, where there has not been a total destruction of the subject-matter of the tenancy in common, but only a partial injury to it, waste or an action on the case will lie by one tenant in common against another; as, if one tenant in common of a wood or piscary does waste against the will of the other, he shall have waste; or if one corrupts the water, the other shall have an action on the case. There are other cases where the only remedy is to retake the property. As, if one take a chattel real or personal entire, the other may retake it when he has an opportunity; but he has no remedy by action. If, again, there be two tenants in common of a house or mill, and it fall into decay, the one is willing to repair, and the other will not, he that is willing shall have a writ de reparatione facienda. It has been said that trespass will lie in this case by one tenant in common against the other, because there has been an expulsion amounting to an actual ouster. Now, if there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that trespass will lie, for in trespass the breaking and entering is the gist of the action; expulsion or ouster is a mere aggrava-

tion of the trespass. If the original entry therefore be lawful, trespass will not lie. In *Taylor v. Cole*, 3 T. R. 292, the first count was for breaking and entering the plaintiff's house, and expelling him. As to the breaking and entering, the defendant justified as sheriff of Middlesex under a fieri facias. Upon general demurrer it was held that the plea, which only justified the breaking and entering by showing a good cause for it, was a full answer, because the breaking and entering were the gist of the action, and the expulsion was only matter of aggravation; and that if the plaintiff had wished to take advantage of the expulsion, which was merely matter of aggravation, he ought to have shown the special matter in a new assignment, in order to make the party a trespasser ab initio. Then, if the expulsion be mere aggravation, trespass will not lie for it, because the original entry is lawful. The original entry being the gist of the action in trespass, and the expulsion mere aggravation, I doubt much whether trespass can be maintained even for an expulsion. Here the defendant pulled down one wall, and built another on its site.

If two persons be tenants in common of land on which there is a wall, and one refuses to repair, and the other pulls down the wall, and sells the materials, and builds a better wall, it may be said that there has been a total destruction of the original wall, more especially if he sold the materials. Still, if he did that for the purpose of getting other materials to make the new wall better than the old one was, and he builds the new one, though there was a destruction of that which was originally the subject-matter of the tenancy in common, an action of trespass will not be maintainable. Such an act is more properly the subject-matter of an action upon the case, because it is in the nature of a partial injury, and not of a total destruction of the subject-matter of the tenancy in common. If tenant for life or tenant for years pull down any wall or other building, it is the subject of an action of waste at the suit of the reversioner. It is expressly laid down in Com. Dig. Estates, (K. 8,) if one tenant in common of wood, turbary, &c., does waste against the will of another, he shall have waste concerning it. Here the pulling down of the old wall without the consent of the plaintiff might be waste. An action of waste is the proper remedy for a reversioner or landlord against a tenant who pulls down a building; and such an action may be maintained by one tenant in common against another, who has improperly pulled down a wall, the common property of the two. Upon the whole, I am of opinion that trespass is not maintainable. The rule for a new trial must therefore be discharged.

Rule discharged.

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The KING v. The Inhabitants of LAWFORD. — p. 271.

A pauper, while he was under age, quitted his parent, and went to sea, serving sometimes in a king's ship, at other times in trading vessels, and remained in such service, and so separated from his father's family, when he attained the age of twenty-one years: Held, that he was then emancipated, and that his settlement did not afterwards shift with that of his father.

UPON appeal against an order of two justices, whereby Hannah Nunn, widow, and her three children were removed from the parish of Lawford, in the county of Essex, to the parish of Saint Anne, Limehouse, in the county of Middlesex, the sessions quashed the order, subject to the opinion of this court on the following case:—

John Nunn, the son of John and Martha Nunn, the late husband of the pauper Hannah Nunn, was born at Wivenhoe. John Nunn, deceased, was married to the pauper Hannah Nunn, he being about twenty-five years of age, and having acquired no settlement in his own right. In 1802, he then being about fifteen years of age, quitted his parents and went to sea, where he continued till the period of his marriage, sometimes serving on board a King's cutter (the *Argus*), and at other times on board different trading vessels, gaining his own living. Up to the age of eighteen his parents resided at Manningtree, and whilst there, the vessel on board of which their son was serving being stationed on the river near that town or its neighbourhood, the mother washed for him, and occasional visits were paid by the son to the parents, sometimes of a few days' continuance. During the period from 1805 to 1810, the parents having quitted Manningtree, removed to St. Anne's, Limehouse, and resided on a tenement of the value of twelve guineas a year; and twice during those five years the son visited them there, and stayed eight or ten days at a time, returning to his ship after each visit. The distance prevented the mother from continuing to wash for the son whilst she and her husband were resident at St. Anne's, Limehouse, but she occasionally sent him small sums for pocket-money. The son attained the age of twenty-one whilst his parents were residing at St. Anne's, Limehouse. In 1810, the parents quitted that parish, and took a tenement of 24*l.* a year at Gravesend, on which they resided when the son married, having been in the occupation of it upwards of a year before such marriage.

*Knox* in support of the order of sessions. It is perhaps too late, since the recent decision in the *King v. Lytchet Matraverse*, 7 B. & C. 226, to contend, that emancipation, which is not completed but by the child's not returning to his father's house under twenty-one, is to be dated from the original separation within the age of minority, and not from his attaining his majority. But that decision is to be confined to the point then in discussion before the Court, which concerned only the doctrine of relation as applicable to this subject, and did not require a review of the principle of emancipation; and, therefore, though that case may be cited as fatal to a settlement in Manningtree, which depends upon relation, yet it does not affect a settlement in Gravesend, which, if established, would sustain this order of removal. The rule is, that a child follows the settlement of a father until he has acquired one of his own; the exception that he ceases to do so, where, by marriage at any period, or any other circumstances after he arrives at full age, he is placed in a condition wholly inconsistent with his being a member of his father's family. The mere fact of coming of age has never been deemed one of those circumstances. Lord *Kenyon*, in *Rex v. Witton cum Twam-brookes*, 8 T. R. 355, directly denied that such a conclusion was to be drawn from the expression used by him in *Rex v. Roach*, 6 T. R. 247. Whether a child is to be considered a member of his father's family depends upon the continuance of any degree of parental control, and not upon the single fact of either actual domicile or of age. In *Rex v. Hardwicke*, 5 B. & A. 176, which was the case of a soldier in the militia, and in *Rex v. Cowhoneyborne*, 10 East, 88, the facts were such as raised the infer

ence of an absolute abandonment of the parental control. There is a distinction between a separation *continuing* after twenty-one and *commencing* after twenty-one. It is conceded that if an adult sever himself from his father's family, emancipation takes place; but it has not yet been ruled that the merely continuing absent from it until of full age, under circumstances that do not exclude all parental control, emancipates. In *Rex v. Lytchet Matraverse*, and in *Rex v. Huggatt*, 2 B. & A. 582, the child was bound for a term; in one case as a servant, and in the other as an apprentice; and it was held, that the parental control still continued, as a certain degree of it was compatible with the control of the master. In *Rex v. Uckfield*, 5 M. & S. 214, though the child had been away from the father's house nearly twenty years, and until she passed her majority, it was holden upon this principle that she was not emancipated. In this case the pauper's husband was constantly in the same condition from his first separation from his parents at the age of fifteen, serving as a mariner in different vessels until his marriage at the age of twenty-four. Nothing had occurred to destroy the degree of parental control, which, upon the authority of the cases, subsisted contemporaneously with the control of his various masters. At the time of his marriage his father was settled in Gravesend, which, unless he was emancipated by coming of age, would consequently be the pauper's settlement.

*Jessopp* (and *Mirehouse* was with him) contra. The cases of *Rex v. Walpole St. Peter's*, Burr, S. C. 638, *Rex v. Stanwix*, 5 T. R. 670, and *Rex v. Hardwick*, 5 B. & A. 176, fully establish that a child who has separated himself from his father's family during his minority, and continues so separated after he has attained twenty-one years, ceases after he becomes of age to be part of the father's family, and is emancipated; and that doctrine was recognised by *Bayley, J.*, in *Rex v. Lytchet Matraverse*. He was then stopped by the Court.

BAYLEY, J. It is very-desirable in deciding sessions' cases to act, whenever it is possible, upon broad principles, and not give effect to such nice distinctions as are raised by the argument in support of this order. The position laid down by *Lawrence, J.*, in *Rex v. Roach* is, that if a child leaves his father's family under twenty-one, and returns while he is under age, he continues to be part of that family, and his settlement will shift with that of his father. But if the child, when he attains twenty-one, is absent from the father's family, the father thereby loses all control over him, he becomes emancipated, and his settlement will not shift with that of the father, but will continue to be in that parish where the father was settled when the child attained twenty-one. *Lawrence, J.*, there says: "In the case of the soldier, the son was enlisted when he was under age, and if he had returned home before he was twenty-one, he would have been considered part of his father's family; or if he had quitted the army before twenty-one without returning home, the father might have reclaimed him by suing out a habeas corpus: but it appears from the case that he had attained the age of twenty-one before he left the army; therefore during the time that he continued a soldier, his father lost all control over him, he being of age; and the subsequent settlement gained by the father was not communicated to him." He then applies the reasoning in that case to the one before the Court, and afterwards says: "If, after such a service as this, the daughter had returned to her father before she was of age, she would have continued as part of her father's family; but not returning till after, she can no longer be considered as



part of his family." The same point was decided in *Rex v. Cowhoneyborne*. There a widower having a daughter, placed her at eleven years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service for him, but without any contract of hiring to give her a settlement of her own, the father in the meantime having gone out to service. It was held, that on her coming of age she was emancipated. There, at the time when she attained twenty-one, she continued absent from her father's family. In *Rex v. Hardwick*, the same doctrine was laid down. The only distinction between that and the former cases was, that the original separation of the pauper from his father's family was not voluntary. While he was under age he was drawn for the militia, and served in it until he was twenty-three years of age. The principle deducible from that case, however, is, that he was not part of his father's family while he continued subject to a control paramount to that of his father; and having while under age contracted a relation inconsistent with the parental control, which relation continued until after he attained twenty-one, the authority of the father thereby wholly ceased, and he could no longer insist on the child's returning to his family. The latter was, therefore, emancipated. Now here at the time when the pauper attained twenty-one the settlement of his father was in Limehouse. He was then in service, where he voluntarily continued after twenty-one; he then became emancipated, and his settlement continued in that place. The order of sessions must, therefore, be quashed.

Order of sessions quashed.

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ATKINSON and Others, Assignees of SLEDDON, v. BELL and Others. — p. 277.

A., having a patent for certain spinning machinery, received an order from B. to have some spinning frames made for him. A. employed C. to make the machines for B., and informed the latter that he had so done. After the machines had been completed, A. ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for B., and C. informed B. that they were ready, but he refused to accept them: Held, that C. could not recover the price from B. in an action for goods bargained and sold, or for work and labor, and materials.

*ASSUMPSIT* for goods sold and delivered, goods bargained and sold, work and labor, and materials found and provided. At the trial, before *Hullock*, B., at the Summer assizes for Lancaster, 1827, it appeared that the defendants were linen and thread manufacturers at Whitehaven, in Cumberland. The bankrupt Sleddon, before his bankruptcy, was a machine-maker residing at Preston, in Lancashire. One Kay, of Preston, obtained a patent for a new mode of spinning flax, and the defendants being desirous of trying the effect of it, on the 12th November, 1825, by letter ordered him to procure to be made for them as soon as possible a preparing frame and two spinning frames, in the manner he most approved of. In January, 1826, Kay ordered two spinning frames and a roving frame to be made by Sleddon for the defendants, and informed them that he had so done. These machines were formed on Kay's first plan, and completed at the end of March, and after they had been so completed they lay in Sleddon's premises a month, while two other machines of these defendants, intended to be used in the same mills, were altered by Sleddon, under Kay's superintendence; and when those had been completed to

his mind, he ordered the machines in question to be altered in the same manner. They were altered accordingly, packed in boxes by Kay's direction, and remained on Sleddon's premises. On the 23d of June, 1826, Sleddon wrote to the defendants, and informed them that the two frames had been ready for the last three weeks, and begged to know by what conveyance they were to be sent. On the 8th of August, a commission of bankrupt issued against Sleddon, under which he was duly declared a bankrupt. The assignees afterwards required the defendants to take the frames, but they refused to do so. It was objected on the part of the defendants, that the action was not maintainable for goods bargained and sold, because the property in the frames had never vested in the defendants. The learned Judge was of opinion that the action was not maintainable, and he directed a nonsuit to be entered, with liberty to the plaintiffs to move to enter a verdict for the price of the machines. A rule nisi having been obtained for that purpose,

*Brougham* and *Parke* now showed cause. The plaintiff is not entitled to recover on the count for goods bargained and sold, because that form of action is not maintainable, unless there be a contract for specific goods, and unless everything has been done so as to vest the property in those goods in the purchaser, and entitle him to maintain trover upon tendering the price. If the contract can be satisfied by selling any goods of a certain description, this action will not lie; but the proper remedy is by a special action of assumpsit for not accepting. As soon as specific goods have been selected by the vendor, and accepted by the vendee, and everything done to vest the property, this action will lie, but not until then. Now here the defendants did not agree to accept any particular goods. They merely ordered machines to be made for them in a particular mode; and the only remedy for the breach of such a contract is a special action on the case for not accepting. That the property in these machines did not pass to the defendants is clear; for in case of a destruction by fire, the loss could not have fallen on them, but it must have fallen on the bankrupt. If the bankrupt had delivered them to another person, the defendants could not have maintained trover for them. They could only have brought an action against the bankrupt for breach of contract, in not making machines according to order. They remained the property of the maker, who might have performed his contract by delivering any other similar machines. Suppose an execution to have issued against the defendants, could these machines have been seized by the sheriff as their goods? They continued the goods of the bankrupt, although he might be liable to an action for breach of the contract. There was no proof of any selection of these goods by the defendants. *Mucklow v. Mangles*, 1 Taunt. 318, is an authority to show that no property in a chattel bargained for vests in the person who orders it until it be finished and delivered, even though the price be paid. And according to the opinion expressed by *Littledale, J.*, in *Simmons v. Swift*, 5 B. & C. 857, goods bargained and sold will not lie merely because the property passes. The mere bargain will not suffice unless the price be ascertained.

Secondly, the plaintiffs cannot recover on the count for work and labour; for that count is applicable to those cases only in which the work is done on account of the defendants. Here it was done upon the plaintiff's own account, in working up his own materials into machines, which,

when completed and accepted, and not until then, could be the property of the defendants. The case of *Towers v. Osborne*, 1 Str. 506, is of very doubtful authority, and was said to be an extreme case by Lord *Tenterden*, C. J., in *Garbutt v. Watson*, 5 B. & A. 613.

*Cross*, Serjt., and *Tomlinson*, contra. There was a specific appropriation of these machines to the defendants after they were finished. Kay was the agent of the defendants; and their letter of the 12th of November, 1825, gave him the most ample powers to act as he thought best for their interest, and therefore he had sufficient authority to appropriate the machines to them if he thought proper. After the machines were completed, they were, by Kay's order, altered according to the latest improvement, and to correspond with other machines of these defendants altered by *Sleddon*, under Kay's superintendence, and intended to be used in the same mill. That was an acceptance of these specific machines by the defendants through Kay. It therefore operated as a purchase of them. This case falls within the principle of the decision in *Woods v. Russell*, 5 B. & A. 942. There it was held, that an unfinished chattel may be appropriated, and that the appropriation vests the property in the chattel in the person by whose order it has been made. It is not true that the bankrupt could by his own act substitute other machines, for he could not send out any without the consent of Kay, the patentee. He could not sell them without the permission of Kay. They could not have been seized under an execution against the goods of *Sleddon*, because the sheriff could not make any title to them without Kay's consent. In *Rohde v. Thwaites*, 6 B. & C. 388, an appropriation of goods by the seller, assented to by the buyer, was held to vest the property in the latter. Here *Sleddon*, by Kay's permission, appropriated the goods to the defendants and they by their agent Kay assented to that appropriation.

Secondly, the plaintiffs are entitled to recover on the count for work and labour. For here the machines, but for the orders given by the defendants, would never have been in existence. The property in the thing ordered vests, when it is completed, by relation in the orderer, and the person who made it may then sue for work and labour. In *Towers v. Osborne*, 1 Str. 506, the action appears to have been for the value or price of a bespoke chariot, and not a mere action for damages for not accepting; and in *Garbutt v. Watson*, 5 B. & A. 613, the form of the remedy in *Towers v. Osborne* was not questioned. They also cited *Dunmow v. Taylor*, Peake, N. P. 41.

BAYLEY, J. I think the rule for entering a verdict for the plaintiff ought to be discharged. If the declaration had contained a count for not accepting the machines, the plaintiffs might have been entitled to recover; and I think now that, upon payment of costs, they should be allowed to set aside the nonsuit, and add other counts to the declaration, and have a new trial. But I cannot say that the property passed to the defendants, so as to enable the plaintiffs to recover on the counts for goods bargained and sold, or for work and labor. It is said that there was an appropriation of these specific machines by the maker, and that the property thereby vested in the defendants. I think it did not pass. Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person

ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered. It is true that Kay saw these things while they were in progress, and knew that the bankrupt intended them for the defendants; yet they might afterwards have been delivered to a third person. This case is not affected by the argument that these are patent articles, because they might have been delivered to a third person with Kay's assent. The case of *Woods v. Russell*, 5 B. & A. 942, is distinguishable. The foundation of that decision was, that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made. Besides, there the ship-builder had signed the certificate to enable the purchaser to have the ship registered in his name; the legal effect of which was held to be to vest the general property in the purchaser. If in this case an execution had issued against Sleddon, the sheriff might have seized the machines. They were Sleddon's goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within *Rohde v. Thwaites*, 6 B. & C. 388, and there would have been a complete appropriation vesting the property in the defendants. But there was not any such assent to the appropriation made by the bankrupt, and therefore no action for goods bargained and sold was maintainable. Then as to the counts for work and labor, if you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request, on your materials, he may maintain an action against you for work and labor. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work and labor, because his labor was bestowed on his own materials, and for himself, and not for the person who employed him. I think, that in this case the plaintiff cannot recover on the count for work and labor.

HOLROYD, J. I think that on the facts given in evidence a verdict might have been sustained on a count for not accepting the machines. I have entertained great doubt during the argument, whether a verdict might not be sustained on the count for work and labor and materials found. I think it will not lie for goods bargained and sold, because there was no specific appropriation of the machines assented to by the purchaser, and the property in the goods, therefore, remained in the maker. Then as to work and labor, the work was done, and the labor bestowed on the materials of the maker in manufacturing an article which never became the property of the defendants. I am of opinion, therefore, that the work was done for the bankrupt, and not for the defendants.

LITLEDALE, J. I am of the same opinion. Goods bargained and sold will not lie unless there be a sale. There could not be any sale in this case, unless there was an assent by the defendants to take the articles. Here there was no assent. The property must be changed, to make the action maintainable. If the property had been changed, the maker could not have delivered these machines to any one but the defendants. I think, however, he might have delivered them to another, notwithstanding any thing that passed, and that the defendants could not have maintained trover against the party to whom they were delivered. In the case of an execution or a bankruptcy, these machines must have been treated as the goods of the maker. As to the count for work and labor and materials, the labor was bestowed, and the materials were found, for the purpose of ultimately effecting a sale, and if that purpose was never completed, the contract was not executed, and then work and labor will not lie. The work and labor and materials were for the benefit of the machine-maker, and not for the defendants.

Rule absolute, on payment of costs.

JOSEPH PRATT, Administrator of ANN PRATT, v. SWAINE.—  
p. 285.

To a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant, knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, afterwards, and after the death of the intestate, to wit, on, &c., converted the same goods, a plea of not guilty of the premises within six years is bad upon special demurrer.

DECLARATION stated that Ann Pratt, in her lifetime, to wit, on, &c., at, &c., was lawfully possessed of divers goods and chattels (describing them) as of her own property, and being so possessed thereof, she afterwards, to wit, on, &c., at, &c., died so possessed, after whose death, to wit, on 20th of October, 1820, the said goods and chattels came to the possession of the defendant by finding, and afterwards and after the death of Ann Pratt, to wit, on the 4th of May, 1822, administration of all and singular the goods and chattels of the said Ann Pratt was granted to the plaintiff; yet the defendant, well knowing the said goods and chattels to be the property of the said Ann Pratt in her lifetime, and at the time of her death, and to belong to the plaintiff as administrator as aforesaid after the death of Ann Pratt, but, contriving to defraud and injure the plaintiff as administrator as aforesaid, had not delivered to him the said goods and chattels, although requested so to do, and the defendant *afterwards and after the death of Ann Pratt*, to wit, on the 1st of January, 1823, converted and disposed of the same to his, the defendant's, own use. Plea, that the defendant was not guilty of the premises in the declaration mentioned, or of any or either of them, at any time within six years next before the exhibiting of the plaintiff's bill, in manner and form as the plaintiff had complained against him. Demurrer, assigning for cause that the plea was argumentative and uncertain, and did not explicitly show that the action was not commenced in due time, according to the statute of limitations; for although the defendant might not have been guilty of the premises mentioned in the declaration within six years next before the exhibiting

the said bill, the said causes of action might have accrued to the plaintiff as administrator as aforesaid within that period.

*Chitty* in support of the demurrer. *Dyster v. Batty*, 3 B. & A. 448, shows that to a declaration in an action on the case a plea of not guilty of the grievances within six years is bad on special demurrer; and *Murray v. The East India Company*, 5 B. & A. 204, is an authority to show that in an action by an administrator upon a bill of exchange payable to the testator, but accepted after his death, the statute of limitations begins to run from the time of granting the letters of administration, and not from the time when the bill became due, there being no cause of action until there is a party capable of suing. That being so, no cause of action accrued to the plaintiff in this case until the letters of administration were granted to him. The defendant by his plea is bound to show that the cause of action did not accrue within six years: he only says that he was not guilty of the premises within the six years. That may be true, and yet the cause of action may have accrued to the administrator within that period.

*Coleridge*, contra. The conversion is the gist of the action, and it is averred in the declaration that the conversion took place *after* the letters of administration were granted. The declaration, after averring the grant of the letters of administration to the plaintiff, states that the defendant, knowing the goods to be the property of the plaintiff as administrator, afterwards converted the same. [*Holroyd, J.* The word afterwards relates to something done after the death of the testator. *Bayley, J.* Suppose issue had been joined on the plea: proof that the conversion took place *before* the granting of the letters of administration would have supported the averment in the declaration. Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him; but no right of action accrues to the administrator until he has sued out the letters of administration. It may be perfectly true, therefore, that the defendant may not have been guilty of the premises within six years, and yet that the cause of action may have accrued to the plaintiff within that period. A defendant who wishes to avail himself of the statute of limitations is bound to show that the cause of action did not accrue within six years: he should either claim the benefit in the words of the *act of parliament*, or in words of equivalent import.]

*Coleridge* then craved leave to amend, which was granted on payment of costs.

See *Batty v. Faulkner*, 3 B. & A. 288. *Short v. McCarthy*, 3 B. & A. 626. *Granger v. George*, 5 B. & C. 129.

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### BRYAN v. WHISTLER, Clerk. — p. 288.

Where a rector granted to A. B. by parol, leave to make a vault in the parish church, and to bury a certain corpse there, and that he should have the exclusive use of the vault; and afterwards, without the leave of A. B., opened the vault and buried another person there: Held, that no action could be maintained against him for so doing; for that if the rector had power to grant the exclusive use of a vault, he could not do it by parol.

Semble, That a rector cannot grant a vault in the church, but only leave to bury there in each particular instance.

CASE for disturbing a vault. The first count of the declaration stated that the defendant was rector of the parish church of St. Clement. Hastings, and plaintiff, being desirous of burying one M. A. W. in a vault in that church, on, &c., applied to the defendant, as such rector, for permission to make a vault there for that purpose, and to put up a tablet or monument near the vault to perpetuate the same; and the defendant, as such rector, in consideration of 20*l.* to be paid to him for such permission, consented and agreed that the plaintiff should have permission to make such vault and to put up such tablet, and should have the *sole and exclusive use* of such vault, upon being paid 20*l.*, and 1*l.* 1*s.* for the service. Averment that the plaintiff did at his expense make such vault, and cause the body of M. A. W. to be buried therein, and put up a tablet, and pay the defendant 20*l.* for such permission, and 1*l.* 1*s.* for the service, yet the defendant, intending to injure the plaintiff, and to deprive him of the exclusive use and benefit of the vault, and right of interment therein, and to disturb the remains of the said M. A. W., afterwards, to wit, on, &c., broke into and damaged the said vault, and wrongfully, and without the leave of the plaintiff, caused the same to be opened, and interred therein the body of another person. The second count, after stating the agreement with the defendant, alleged that the plaintiff, with the knowledge and consent of the defendant, put up a tablet near the vault with a certain inscription thereon, viz. "In a vault beneath this tablet (appropriated to the family of T. B.) are the remains of M. A. W.," &c.; and then concluded as in the first count. Third count alleged generally that the plaintiff by the consent and agreement of the defendant, given in consideration of 20*l.* to him paid, had become and was entitled to the exclusive use of a vault in the said church, and that the defendant wrongfully defaced and injured, and opened it. Plea, not guilty. At the trial, before *Gaselee, J.*, at the Sussex Summer assizes, 1827, it was proved that in the year 1819, the plaintiff applied to the defendant for leave to make a vault, as stated in the declaration; the defendant by parol granted leave, but demanded a fee of 20*l.*, which sum was paid to him. The vault was made at the plaintiff's expense, and the defendant performed the burial service over the body of M. A. W., who was buried in the vault, to the size of which the defendant made no objection at that time. After the funeral the defendant gave the following receipt to the plaintiff: "Received, 18th September, 1819, of T. B., Esq. 20*l.* for permission to make a vault in the church of St. Clement, Hastings, between the south wall and aisle thereof, and to put up a tablet or monument to perpetuate the same, &c., &c., and one guinea for the service, &c." Soon after the funeral the plaintiff put up a tablet with the inscription set out in the second count. This was frequently seen by the defendant, who made no objection to it. In the year 1825, the defendant, without the plaintiff's leave, caused the vault to be opened, and buried another corpse there. Upon these facts it was contended that the plaintiff had no such interest in the vault as would enable him to maintain the action, for that there was not any conveyance or other instrument vesting in him an exclusive right to the vault, and the case of *Hewlins v. Shippam*, 5 B. & C. 221, was cited. The learned Judge gave the defendant leave to move to enter a nonsuit on that ground; and the jury having found a verdict for the plaintiff, *Marryat* in Michaelmas term obtained a rule nisi for entering a nonsuit, against which

*Gurney, Hodgson, and Chitty* showed cause. The objection to this action is founded on the supposition that the plaintiff claims a freehold interest in the land. But the declaration does not disclose any such claim, and for the injury therein alleged an action is maintainable; for if a person with the assent of the incumbent erects a tomb, no one can lawfully disturb it. In the 3d Inst. 202, Lord Coke says, "Concerning the building or erecting of tombe, sepulchres, or monuments for the deceased in church, chancel, common chapel, or churchyard in convenient manner, it is lawful, &c., and the defacing of them is punishable by the common law, as it appeareth in the book 9 Ed. 4, 14 a, and so it was agreed by the whole Court. Mich. 10 Jac., in the Common Pleas, between Corven and Pym." *Frances v. Ley*, Cro. Jac. 366, third resolution, establishes the same point. In Degge's Parson's Counsellor, 176, 6th ed., it is said that the right to make tombs must be intended to be by license of the bishop or consent of the parson and churchwardens; and in Gibson's Codex, 542, it is said that burials within the church may be with the consent of the incumbent only. But, secondly, supposing the plaintiff is bound to rely on the agreement, the case of *Hewlins v. Shippam*, 5 B. & C. 221, cited at the trial by the counsel for the defendant, is not in point. There the right claimed by the plaintiff was in derogation of the freeholder's rights; here the right claimed is quite consistent with his right, and is claimed under the very purpose for which the freehold is vested in the defendant, viz., for the burial of the dead. It is impossible to apply common-law doctrines and principles to such a case. No form of conveyance by a rector giving a perpetual right can be suggested. Where a faculty is granted, the instrument merely states that the party has obtained the assent of the incumbent or ordinary. The right must rest on the permission to bury in that vault; and when that leave was given, the vault made, and the body buried in it, the defendant could have no right to disturb it. Such a license may well be granted by parol, and when executed is irrevocable: *Winter v. Brockwell*, 8 East, 808; *Taylor v. Waters*, 7 Taunt. 374. [*Bayley, J.* It may be good as a license to bury there, and yet may not give an exclusive right.] The inscription seen and assented to by the defendant was a declaration by him that he had appropriated that vault to the plaintiff, not that he had transferred any property to him. And even supposing that an incumbent cannot so appropriate as to bind his successor, still he must be bound during his own incumbency. No inconvenience is to be apprehended from such agreements, for if they are improperly made they may be corrected by the spiritual court: *Palmer v. The Bishop of Exeter*, 1 Str. 576.

*F. Pollock, contra.* The evidence given at the trial did not support any count of the declaration. The plaintiff declared in each count upon a right to the exclusive use of the vault in question, and complained of an injury to that right; but he totally failed in establishing the right alleged, which could only be granted by deed. Upon this point *Hewlins v. Shippam* is decisive. It is said that common law rules cannot be applied in this case; but the action is for an injury to a common law right; it must, therefore, be governed by those rules. The case of *Taylor v. Waters* was very different; there a party who had obtained a license to enter the Opera House was turned out; here the utmost that the plaintiff could claim was a license to bury a particular person; he enjoyed that right, and the corpse of that person has not been removed or disturbed. Again, if the exclusive use of the vault was granted, the action should have been trespass, and not case.



BAYLEY, J. I am extremely sorry that an individual in the situation of the defendant, having received a pecuniary compensation for the grant of a privilege intended to be binding at all events during his own incumbency, should afterwards keep the money and recede from his undertaking. But if the question of law be with him, his defence to this action must prevail. It seems to me that the objection raised is valid. The declaration states in substance, that in consideration of a certain sum of money, the defendant agreed that the plaintiff might make a vault, and have the *sole* and *exclusive* use of it. If that were an interest in land, the grant could not be binding under the statute of frauds, unless there were a memorandum in writing signed by the party granting. No memorandum was in this instance signed except the receipt, which is silent as to the exclusive use of the vault, and the action is brought for a violation of the plaintiff's right to the exclusive use. If it be not an interest in land, it is an easement; or the grant of an incorporeal hereditament; which could only be effectually granted by deed, and no such instrument was executed. But even had a deed been executed, I think the defendant had not power to grant any privilege, except for the particular burial then about to take place. The rector has the freehold of the church for public purposes, not for his own emolument; to supply places for burial from time to time, as the necessities of his parish require, and not to grant away vaults, which, as it seems to me, cannot be done unless a faculty has been obtained. Even by means of a faculty, a pew can only be granted to the inhabitants of a parish, and it is for the most part limited to a house, a removal from which destroys the right to the pew. Now, I cannot find any good reason why the same rules should not be applicable to a vault. In *Com. Dig. Cemetery*, (B,) it is said, "A man may prescribe that he is tenant of an ancient messuage, and ought to have separate burial in such a vault within the church." This is like the prescription for a pew in *Rogers v. Brooks*, 1 T. R. 431, n. In the latter case the prescription implies a faculty. Why, then, should it not in the former? The objection to the form of action does not appear well founded, for the right claimed is not to the soil, but to an easement; but for the reasons above given, I am of opinion that a nonsuit must be entered.

HOLROYD, J. It seems to me, that if the action were maintainable, case would be the proper form, the claim being to an easement. But whether it be an easement or an interest in land, the action cannot be supported. The declaration states that an application was made by the plaintiff to the defendant, for permission to make a vault, and have the exclusive use of it; and that the defendant agreed that he might do so. If that could be considered as giving the exclusive use of the vault for all purposes, trespass would lie; but it must be taken as giving a special use of the vault, viz., for the purposes of burial; case, therefore, was the proper remedy, as it is for the disturbance of a pew, the right to which is granted for the special purpose of attending divine service. But whether the grant were for a special purpose or general for all purposes, the right could not pass without deed or writing. Here, therefore, the plaintiff proved no legal right, and consequently cannot sustain his action.

LITTLEDALE, J. I am of opinion that this action is not maintainable. The right claimed does not appear to be an interest in land, so as to be affected by the statute of frauds. The right said to have been granted

was merely a privilege to make a vault and bury there. The right is claimed as an easement, giving a sole and exclusive privilege of burial. Now, according to Com. Dig. Cemetery, (B,) that must be prescribed for as appurtenant to an ancient messuage. Prescription presumes a grant, and I have little difficulty in saying that the rector had no power to grant the privilege claimed in this case. The right acquired can be no higher than the right to a pew, which can only be claimed as appurtenant to an ancient messuage or by a faculty. In *Frances v. Ley*, Cro. Jac. 366, it is said, "that neither the ordinary himself, nor the church-wardens, can grant license of burying to any within the church, but the parson only, because the soil and freehold of the church is only in the parson, and in none other;" but in Gibson's Codex, 542, this is denied to be the true reason, for it would apply equally to the churchyard, but that the ecclesiastical laws have appointed the incumbent as the proper judge of the fitness or unfitness of any particular person to have the privilege of being buried in the church. The incumbent, therefore, may exercise a discretion in each particular instance, where application is made for leave to bury in the church, but he has no power to grant to another the privilege of burying there whomsoever he pleases. For these reasons I concur in thinking that a nonsuit must be entered.

Rule absolute.

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**DOE, on the demise of JEFF and HUNTER, v. ROBINSON and Another. — p. 296.**

Where the tenant of lands, granted to him and his heirs pur auter vie, devised them "to A. B.," without saying more, and A. B. died, living cestui que vie: Held, that the heir of the devisor was entitled to the lands as special occupant.

THIS was an action of ejectment on the demise of Robert Jeff and Thomas Hunter, the demise being laid on the 16th May, 1827, against John Robinson and Thomas Dowson Robinson, for the recovery of certain lands in the township of Northallerton, in the county of York. Plea, not guilty. At the trial, before *Bayley, J.*, at the Yorkshire Summer assizes, 1827, a verdict was found for the plaintiff, subject to the opinion of this Court, on the following case: —

By a lease, dated the 24th of November, 1783, and made between the Lord Bishop of Durham of the one part, and Thomas Dowson of the other part, the said bishop did demise, lease, and to farm let unto the said Thomas Dowson, his heirs and assigns, all that half oxgang of new land, arable, meadow, and pasture, with the appurtenances, lying in the fields of Northallerton aforesaid, formerly called by the name of the Chapel Garths, and then divided into eight closes, and containing in all about twenty-four acres, to have and to hold unto the said Thomas Dowson, his heirs and assigns, from the making of said lease, for and during the natural lives of him the said Thomas Dowson, John Dowson, his son, and Thomas Robinson, and the lives of the longest life of them, at the yearly rent or sum of 5s. 1d., payable at the times therein mentioned.

By his will, dated 21st November, 1808, and duly made, executed, and attested to pass real estates, Thomas Dowson, being then in possession of the same premises under the said lease, devised as follows: — "I give

my daughter Elizabeth Robinson my two houses, situated in Bootham, nigh the city of York, now tenanted by widow Earl and William Collyer, and my two closes, lying within the township of Northallerton, known by the name of the Chapel Garths, and west of the barn close, (the said two closes being the lands in question, and part of the eight closes demised to Thomas Dowson by the Bishop of Durham.) I also give her my desk in my parlor, and she to choose other furniture within my house to furnish two rooms. I give my daughter Parthenia Robinson my three closes called Bullmoors; and also one other close called Barn Close, all the aforesaid closes being within the township of Northallerton. I give her all the said four closes for and during her natural life, and at her decease I give the said four closes to her children then living, share and share alike; and I order that Robert Robinson, my son-in-law, shall have no concern either in letting the lands, or in taking any part of the rents from the lands. And as to all the rest of my estate, both real and personal, I give to my son John Dowson, and also a security for the payment of 20*l.* per annum for and during the life of my daughter Ann Dowson, he paying my said daughter Ann Dowson 40*l.* per annum, to be paid out of the rents arising from the Turks Banks; and also all my just debts and funeral expenses, and also for leasing the half oxgang after my decease; and, lastly, I make my said son John Dowson my sole executor of this my last will and testament." Thomas Dowson died on the 14th of March, 1814, without having altered or revoked his said will, and upon his death, Elizabeth Robinson entered into possession of the premises, thereby devised to her, and received the rents thereof until her death on the 1st of February, 1826, at which period John Dowson and Thomas Robinson, two of the cestui que vies mentioned in the said lease, were still living. After the death of Elizabeth Robinson, the defendants, her only children, entered into possession of the premises in question. John Dowson, the heir at law as well as residuary devisee and executor of Thomas Dowson, died on the 20th February, 1827, having previously, by his will, duly made, executed, and attested to pass real estates, and bearing date the 20th September, 1822, given and devised all and every his freehold lands, tenements, and hereditaments situate in the township of Northallerton, in the county of York; and all other his messuages, lands, and hereditaments whereof he was seised or entitled unto in reversion, remainder, or expectancy, situate in the township of Northallerton aforesaid, and in or near the suburbs of the city of York or elsewhere in the said county of York; and all his the said testator's personal estate, unto the said Robert Jeff and Thomas Hunter, their heirs, executors, administrators, and assigns, according to the respective natures and tenures thereof upon the several trusts therein mentioned. And the said testator appointed them executors in trust of his said will. The said Thomas Robinson, one of the cestui que vies named in the said lease of the 24th November, 1783, is still living.

The question for the opinion of the Court was, what interest in the said two closes passed to Elizabeth Robinson under the will of Thomas Dowson.

The case was argued at the sittings in banc after last Hilary term by *Alexander* for the plaintiff. Thomas Dowson had in the lands in question a freehold estate, which, if undisposed of by will, would descend to his heir. It was not disposed of, except for the life of Elizabeth Robinson, and, therefore, at her death the heir of Thomas Dowson was entitled to the lands. There must be words of limitation, or words tantamount,

in order to give more than a life estate. Now the devise by Thomas Dowson was merely "to Elizabeth Robinson," without more. On the other side, *Williams v. Jekyl*, 2 Ves. sen. 681, and *Ripley v. Waterworth*, 7 Ves. jun. 440, will probably be relied on to show that an executor may be a special occupant; and thence it may be argued that the law will supply the word *executors*, and the devise in question may be considered as a devise to Elizabeth Robinson and her executors, and that the whole estate of T. Dowson would pass under those words. But in the former case the grant was originally to A. and his executors, and Lord *Hardwicke* treated the estate as being of a personal nature, and he distinguished it from "a descendible freehold to A. and his heirs." In *Ripley v. Waterworth*, Lord *Eldon*, indeed, says, that an executor may be a special occupant, but there the estate was expressly given to the party and his executors, and he cites *Westfaling v. Westfaling*, 3 Atk. 460, as an authority in point, but that is founded on a case in 2 Roll. Abr. tit. Occupant, (G) pl. 2. which cites *Dyer*, 328, and there no such point appears to have been decided. On the other hand, there are many cases in which it has been held that an executor cannot be a special occupant. In 2 Roll. Abr. Occupant, (G) pl. 3, it is said, "If a man grant a rent to another, his executors and assigns for the life of T. S., and the grantee dies, making an executor but no assignee, the executor shall not be a special occupant for this, that it is a freehold which cannot descend to the executor." *Salter v. Butler*, found in several books, Cro. Eliz. 901, Yelv. 9, Moore, 664, Noy, 46, decided the same point. [*Bayley*, J. If under a lease to A. and his executors, *pur auter vie*, the executor cannot be a special occupant, why can the heir where the grant is to A. and his heirs?] In Com. Dig. Estates, (F 1) it is said, "So if a lease be to A. and his heirs *pur auter vie*, and A. dies, his heir shall be special occupant;" and the same rule is laid down in Bac. Abr. tit. Estate for Life and Occupancy, (B 8). In *St. John's College v. Fleming*, 2 Vern. 320, it appeared that the Dean and Chapter of Carlisle made a lease to T. S. for three lives. *Habend.* to him, his executors, administrators, &c., for three lives; the lessee dying, the question was, Whether this should be looked upon as a descendible estate, and go to the heir, or whether the executor should have it. The Court decreed it to be in its nature an inheritable estate, and that it should go to the heir. And, in *Campbell v. Sandys*, 1 Scho. & Lef. 288, Lord *Redesdale* dissented from the doctrine that an executor can be a special occupant. [*Bayley*, J. Is not the real question here, how much did T. Dowson give away by his will?]

*Cresswell* for the defendants. The only question is, how much of the estate which Thomas Dowson had passed by his will. It is, therefore, quite unnecessary to inquire whether an executor can or cannot be a special occupant. The point, however is clear; there is not any authority for saying that an executor may not be a special occupant of *lands*. The case of *Salter v. Butler*, and the passage in 2 Roll. Abr. tit. Occupant, (G) pl. 3, related to a *rent*, and all the doubt (if any exists) upon this question has arisen from a want of discrimination between the grant of a rent and the grant of lands. The distinction between them is pointed out in Bac. Abr. tit. Estate for Life and Occupancy, (B 8). Then as to the question in this case; the words used by Thomas Dowson in devising the lands in question are sufficient to give the whole of his estate in them to the devisee. It has never yet been disputed that a general devise of lands to A. gives him an estate for his own life, provided the testator had so much to dispose of. But an estate for a man's own life, is in

contemplation of law greater than an estate for the life of another. *Lewis Bowle's case*, 11 Co. 88, and words sufficient to convey the greater estate must be sufficient to convey the lesser. It could not, therefore, be contended that an estate to A. for the life of another, or for the lives of any number of persons, would not pass by a general devise to B. without words of inheritance. If, then, the grant in question had been merely to T. Dowson for three lives, his devisee, Elizabeth Robinson, would have taken the whole of his estate, although it might happen to endure beyond her life. But the introduction of the word *heirs* into the original grant to T. Dowson, is supposed to affect the construction to be put upon the words of his will, and to confine their operation to the giving an estate to the devisee for her own life only. The necessity for words of inheritance in order to convey more than an estate for the life of the grantee, arose from the strictness of the feudal law. In Gilbert's *Tenures*, p. 8, it is said, "Feuds are hereditary or for life. In hereditary feuds the word *heirs* is required to distinguish it from the original feud that was for life only;" and in note 8, this passage from Craig is cited, "Donationes sint stricti juris ne quid plus donasse præsumatur quam in donatione expresserit." The word *heirs* then was originally used for the purpose of measuring the quantity of estate granted. When applied to a grant *pur auter vie*, it has no such effect: whether it be or be not used, the estate parted with by the grantor is the same, and is commensurate with the life of *cestui que vie*; the estate taken by the grantee is the same, and he has the same disposing power over it; this is apparent from *Litt. s. 56*, and the commentary upon it, 1 *Inst.* 41. Neither does the word *heirs* in the grant of such an estate alter its quality. In either case it is simply an estate of freehold for life or lives, and not an estate of inheritance, *Edward Seymour's case*, 10 Co. 98. An estate to A. and his heirs has sometimes been termed a descendible freehold; but that description of it is inaccurate, for the estate of the special occupant has none of the incidents of an estate taken by descent. Before the passing of the stat. 29 Car. 2, it was not real assets, or the statute would have been unnecessary; the widow is not entitled to dower, *Low v. Burron*, 8 P. W. 262. The death of the ancestor and occupancy of the heir does not, as a decent cast, take away a right of entry, *Litt. s. 387*. 1 *Inst.* 239. In *Doe v. Luxton*, 6 T. R. 291, Lord *Kenyon* says that such estates have been improperly termed descendible freeholds, and in *Ripley v. Waterworth* Lord *Eldon* expressed a similar opinion. If then neither the quantity nor quality of the estate granted to T. Dowson was altered by the introduction of the word *heirs* into the grant, the only effect of it was to appoint a special occupant to take on the death of the grantee, provided he died without disposing of the estate. It cannot be contended that the estate, because created subject to special occupancy, could only be devised subject to special occupancy, for then even had the testator devised "all his estate" in the lands in question (words sufficient to pass a fee), that would not have sufficed to give this estate *pur auter vie*, because the devisee would not have taken it, subject to special occupancy, but on her death it would have gone to her executor, as assets under the statute, and the surplus would, after payment of debts, have been distributed amongst the next of kin. Upon principle, therefore, the defendants are entitled to a decision in their favour; and there are two cases expressly in point for them, *Williams v. Jekyl* and *Campbell v. Sandys*. In the former, a freehold lease for three lives was granted to Elizabeth Elliott, her executors.

administrators, and assigns. She, for valuable consideration, made an assignment of the premises, and of her right, title, and interest in and to the same, to a trustee to the use of her son J. W., for and during the term of his natural life, and from and after his decease to the use of his issue lawfully begotten, and for the want of such issue to the use of E. L., her executors and administrators, during the residue of the term. J. W. had a son, and Lord *Hardwicke* decided that the word *issue* there meant *children*, and that the son of J. W. took the whole estate; and he concludes his judgment by saying, "I have no doubt at all, but if it had been a plain assignment by her during the term to J. W., without saying more, he would have the whole in him." That is a direct authority that a simple assignment of an estate, *pur autre vie*, to A. B. without more, is sufficient to take the whole away from a special occupant. Whether the special occupant designated in the original grant be the executor or heir of the grantee, cannot make any difference in principle. In *Campbell v. Sandys*, D. C. being seised of premises held by leases for three lives to him and his heirs, agreed to make a settlement on his son John, and Anna his wife, and to assign the premises to the use of himself for life, and after his decease to the use of John C. for life, and after his decease to the issue of the said John and Anna, and there Lord *Redesdale* held, that *issue* meant *children*, and that under this agreement, the equitable right to the absolute property vested in the only child of John and Anna.

*Alexander* in reply. In the case of *Williams v. Jekyl*, the party seised professed to grant the whole of her estate; that case, therefore, is distinguishable from the present; and in *Campbell v. Sandys* the question turned on the supposed intention of the parties, and not on the words of the deed. The argument founded on the quantity and quality of the estate is inapplicable, because this is a question as to the passing of an estate, and not the creation of it.

*Cur. adv. vult.*

**BAYLEY, J.** This was an ejectment by devisees claiming under the heir at law and residuary legatee of Thomas Dowson, against the children of Elizabeth Robinson, a devisee of the same Thomas Dowson. The property consisted of two closes at Northallerton, which Thomas Dowson held under a lease for lives from the Bishop of Durham. By that lease the closes were demised to Dowson, his heirs and assigns, for the life of himself and two other persons, and the life of the longer liver. By his will Thomas Dowson devised these closes to his daughter Elizabeth Robinson; but there were no words in the devise to show an intention in the testator to pass his whole interest, nor any words of limitation; so that had the property been fee-simple, it is clear an estate for life only would have passed; and the question is, Whether it makes any difference that the property is not fee-simple, but an estate *pur autre vie*. At common law, as the original grant was to Thomas Dowson and his heirs, his heirs would have taken as special occupants upon his death, unless he had made an alienation in his lifetime to prevent it. Had he aliened in his lifetime to a particular individual, without any words of limitation, or any thing to extend that individual's estate beyond his life, his interest would have ceased upon his death. His representatives would have had no claim; and unless Dowson, or his heir, could have claimed it, it would have been open to general occupancy. By the statute of frauds, 29 Car. 2, c. 3, s. 12, such an estate as this is devisable in manner therein mentioned; and if no such devise thereof be made, it shall be chargeable in the hands of the heir, if it come to him as special occupant, as assets by descent, as in case of

lands in fee-simple; and if there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. Upon this statute the owner of an estate, *pur autre vie*, may devise it to several in succession, so as to designate who shall occupy till *cestui que vie* dies, and to leave no interval or chasm, (3 P. Wms. 262;) but I have not been able to meet with any case which decides what shall become of it, if it be only partially devised, that is, if it be devised for a period which expires before the estate *pur autre vie* ends. In such cases it must belong either to the representatives of the devisor, the representatives of the devisee, or become the subject of general occupancy. Upon the language of the 29 Car. 2, c. 3, s. 12, with the legislative explanation it receives from the 14 G. 2, c. 20, s. 9, it seems to me that it belongs to the devisor. The language of the 29 Car. 2 is, that "any estate *pur autre vie* shall be devisable." If there be a devise which will provide for the occupancy till all the lives fail, the estate, that is, the whole estate, will be devised; upon a devise which may or must leave a chasm before all the lives fail, there is only a partial devise of the estate, and as to the residue there is no devise thereof. If, for instance, A. have an estate for the lives of B., C., and D., and he devise it to E. until either B., or C., or D., die, he devises the property for a part only of the estate *pur autre vie*, and as to the residue of that estate he makes no devise thereof. The next provision, then, in the 29 Car. 2, "if no such devise thereof be made," may, and upon the principles on which that act is founded, viz., to prevent general occupancy, ought to attach upon the portion which is not devised, and then that portion will be chargeable in the hands either of the heir or executor; and though it is not in terms mentioned whose heir is contemplated, it is shown whose executor is contemplated, viz., the executor of the party that took the estate by virtue of the grant, which must mean the executor of the devisor, not the executor of the devisee. And if it be the devisor's executor that is contemplated when executors are mentioned, it must be the devisor's heir that is contemplated when the heir is mentioned. And this exposition of the 29 Car. 2 is supported and explained by the provision in the 14 G. 2, c. 20, s. 9. The former statute had made the undevised estate assets in the hands of the heir, or of the executor; but it had made no provision as to the residue, where the estate was made personal assets. The 14 G. 2, therefore, provides that estates *pur autre vie*, of which there shall be no special occupant, of which no devise shall have been made, or so much thereof as shall not have been so devised, shall go, be applied, and be distributed, in the same manner as the personal estate of the testator or intestate. That act, therefore, evidently proceeds upon the assumption that so much of an estate *pur autre vie* as is not subject to special occupancy, or has not been devised, is to pass to the executor. In this case, we think that judgment must be given for the lessors of the plaintiff, inasmuch as nothing but an estate for the life of Elizabeth Robinson is devised; of so much of the estate *pur autre vie* as remained at her death, there was no devise, and that part, therefore, belonged not to the representative of Elizabeth Robinson, but to the heir of Thomas Dowson as special occupant, and not to his devisee.

Postea to the plaintiff.

## DOE, on the demise of HENNIKER, v. WATT. — p. 308.

By a memorandum of agreement, in consideration of the rent and conditions thereafter mentioned, A. was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was stipulated that no buildings should be included or leased by virtue of the agreement; and it was further agreed and stipulated that A. should take, at the rent aforesaid, certain other parcels, as the same might fall in; and, lastly, it was stipulated and conditioned that A. should not assign, transfer, or underlet, any part of the said lands and premises, otherwise than to his wife, child, or children: Held, that by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment.

EJECTMENT brought to recover certain lands and premises in the county of Somerset. This cause was tried, before *Burrough, J.*, at the Summer assizes for the county of Somerset, 1827. It appeared that the defendant, in October, 1825, became tenant to the lessor of the plaintiff of the premises in question, under and by virtue of the following instrument, signed by the defendant, and bearing date the 24th day of October, 1825: "Memorandum of agreement made with George Watt, bailiff, of the manor of Chalcott, otherwise Calcott, in the county of Somerset. The said G. Watt, in consideration of the rent and conditions hereinafter mentioned, is to have, hold, and occupy, as on lease, every part and parcel of all that piece or tract of turbary land, commonly called The Five Hundred Acres, situate in the said manor, which may now be in hands and disengaged or unlet, for the term of twenty-one years from Lady-day, 1825, at the yearly rent of 5s. an acre, payable quarterly, and free and clear of all charges, rates, and outgoings whatsoever; and is likewise to have, at the like rent of 5s. an acre, all and every parcel of the said Five Hundred Acres which may fall in hand and become unlet between this time and the expiration of the said term of twenty-one years; provided always, that the entire or total quantity of land in the said Five Hundred Acres, occupied by the said G. Watt by virtue of this agreement, shall never exceed 100 acres in the whole; and that the term or lease of all and every parcel occupied or possessed under this agreement shall cease or determine in twenty-one years from Lady-day aforesaid. And it is stipulated that no house or cottage, stable, or other substantial building, nor any parcel of land on which such building now stands, or may hereafter be erected, shall be included in or leased by virtue of this agreement. And it is further stipulated and agreed that the said G. Watt shall take and occupy, at the rent aforesaid, every parcel of land in the said Five Hundred Acres as the same may fall in hand, without choice, exception, or refusal, until the total quantity amounts to 100 acres, as before mentioned. And also that G. Watt shall, on possession, proceed to cultivate and improve every parcel as the same comes to his occupation, whether it be late or early in the said term of twenty-one years, in like manner or method as he means towards the parcels of which he has immediate possession. And, lastly, it is stipulated and conditioned that G. Watt shall not assign, transfer, underlet, or part with any part or parcel of the said lands or premises otherwise than to his wife, child, or children." It was proved that the defendant had underlet part of the demised premises; and it was insisted, on the part of the lessor of the plaintiff, that the last clause in the agreement operated as a condition, and that the underletting was a breach of that condition. The learned Judge was of opinion that the clause did operate as a condition; but he reserved liberty to the defendant to move to enter a nonsuit on that point



if the verdict should be against him. The defendant then gave some evidence which, it was contended, clearly showed that the defendant had underlet with the knowledge, and, in some degree, by the directions of the lessor of the plaintiff, and amounted to a waiver, if not to an express license. The learned Judge thought that the evidence applied to other lands of the lessor's which the defendant managed as his bailiff, and directed the jury to find a verdict for the plaintiff. *Jeremy*, in last Michaelmas term, obtained a rule nisi for a nonsuit, on the ground that the clause prohibiting the defendant from assigning or underletting did not operate as a condition, but merely as a covenant; and, secondly, for a new trial, on the ground that the evidence of license had not been distinctly presented to the jury.

On a former day *Moody* showed cause. The clause in the agreement, whereby the tenant was prohibited from under-letting, is a condition. The words "sub conditione," "provided always," or "ita quod," of themselves, in a conveyance of real property, make estates upon condition, Litt. s. 328, 329. There are other words which, in such an instrument, make an estate upon condition, provided a power of re-entry is added to them, as the words "si contingat," Litt. 330. Co. Litt. 204 a. Shepp. Touch. 120. Com. Dig. tit. Condition (A 2). If this instrument, therefore, contained a conveyance of a freehold estate, there could not be any doubt that the last clause would operate as a condition. The instrument operates as a lease for years. Now Co. Litt. 204 a, shows that conditions may be annexed to demises for years, without the formal words required in the case of freehold estates of inheritance. It is sufficient if words be used which show the intention of the lessor to make the estate conditional, as "quod non licebit dare, vendere, vel concedere statum sub poenâ forisfacturæ;" and Litt. s. 365, shows, that as to chattels real, as leases for years, a man may plead that such leases were made upon condition, without showing any writing of the condition. In *Plowd.* 142, it is said, "If a man make a feoffment in fee to one, ad erudiendum his son in an art, it is a condition, because the words purport such intent, and, therefore, they are conditional, although there are not the usual words." It may be urged, that conditions are considered to be odious in law, and that they are to be construed strictly, Co. Litt. 219 b. Vin. Abr. Condition (E r). This is said of the construction of acts alleged to be forfeitures of admitted conditions to defeat estates, not words doubtful whether they amount to a condition. Here there can be no doubt that it was the intention of the lessor to prevent the lessee from underletting, and the most effectual mode of doing so was to make the lease void on his doing such an act. The words, "provided always, and it is covenanted and agreed," create both a condition and a covenant, Co. Litt. 203 b, *Cromwel's case*, 2 Co. 270.

*Jeremy*, contra. First, this is only an agreement, and not a deed, and it is doubtful whether a condition can be reserved upon that which amounts to a mere parol contract; and although a lease of land upon condition may be pleaded without deed, 1 Roll. Abr. 4143, Vin. Abr. Condition (R), 69, yet an estate upon condition cannot. The instrument in this case contains no words of present demise, but is only that the defendant shall hold "as on lease." Conditions, the effect of which is to destroy an estate, being odious in law, are to be strictly construed, and not to be created without sufficient words, *Machel v. Dunton*, 2 Leon. 38. Here, also, if the clause in question operates as a condition, all the

preceding clauses must equally operate as conditions. But as the lease professes to pass land in reversion as well as in possession, the condition cannot apply to the lands which the lessee was to take in reversion after the determination of the previous estates for lives, and which might never come in esse. If the clause in question occurred in a deed, it would operate as a covenant, but not as a condition, *Doe d. Wilson v. Phillips*, 2 Bingh. 13, and *Doe d. Wilson v. Abel*, 2 M. & S. 541. The proper words, according to Lord Coke, 204 b, to make a condition, are "*sub conditione*" (which is the most express and proper), or "*proviso semper, itaquod, or quod si contingat*," which last words always require something else, as, a clause of re-entry, &c., Litt. s. 328. The words in this instrument, "it is stipulated and conditioned," must be construed according to the intention of the parties in reference to the particular subject-matter, and must be taken either as a covenant or condition, but not as both, 4 Cruise Dig. 378. Now looking at the nature of the subject-matter to which they apply, they could not have been intended to operate as a condition. For a condition being entire, when it is gone as to part, is gone *in toto*, and must destroy the whole estate, *Corbet's case*, 1 Rep. 86, *Cooper v. Andrews*, Hob. 43. Here the estate granted is partly in possession, partly in reversion, and some portion of it might never arise. The condition cannot apply to the estate in reversion, because the lessee could not assign or underlet the lands of which he was never in possession, nor could the lessor take advantage of breaches of the condition by parcels, as in waste, by which he may recover the particular place wasted. And even if the clause might be construed either as a condition or a covenant, yet upon the principle that words shall be construed most strongly against the party using them, the court will not construe it as a condition, if by so doing it be repugnant to the estate granted, or uncertain as to the extent to which it is to operate; and at all events the instrument is *equivocal*, whether it passes any interest upon which a condition can operate. Assuming that the clause amounts to a condition, of the breach of which the lessor might take advantage; there was evidence that the underletting had been made by the defendant with the knowledge and concurrence of the lessor; no forfeiture, therefore, accrued; or if any forfeiture had been incurred, it was a clear waiver, if it did not amount to an express license to underlet the particular lands, and should have been so presented to the jury. *Cur. adv. vult.*

BAYLEY, J. This was an ejectment brought for breach of a condition contained in an agreement for a lease. There are two questions; first, Whether the agreement contained a condition or not; the second, Whether the plaintiff had not destroyed his right to enter upon the lands demised for the breach of the condition, because the act constituting the supposed breach was done with his concurrence. The Court, at the time of the argument, felt that this question had not been submitted to the jury, and, therefore, held that there ought to be a new trial, even if there was a condition contained in the agreement. But if there was no such condition, then there ought to be a nonsuit. The parties stood in the relation of landlord and tenant. There was an agreement made between the lessor of the plaintiff and defendant, by which the defendant, in consideration of the rent and conditions thereafter mentioned, was to have, hold, and occupy, as on lease, every part and parcel of the turbary land called the Five Hundred Acres, &c., which might then be underlet or disengaged, for twenty-one years from Lady-day, 1826, at the rate of 5s. per acre, payable quarterly, clear of all charges and outgoings what-

soever; and to pay the like rent of 5s. per acre for all and every parcel of the Five Hundred Acres which might fall into hand or come into possession before the expiration of the said term of twenty-one years. Then it was stipulated that no house, &c., should be included in or leased by virtue of the agreement, and it was further stipulated that the said G. Watt should take and occupy, at the rent aforesaid, every parcel of the land in the said Five Hundred Acres as the same might fall in hand; and also that G. Watt should, on possession, proceed to cultivate every parcel as the same came to his occupation. And, lastly, it was stipulated and conditioned, that the said G. Watt should not assign, transfer, underlet, or part with any part of the said lands otherwise than to his wife, child, or children. The question is, Whether a condition be contained in the last clause. This document is not under seal; and it has been said by the defendant's counsel that it is not therefore calculated to raise a condition. But the circumstance of its not being under seal is immaterial. A party who demises land by an instrument not under seal may introduce a condition into it, provided he use apt and proper words for the purpose. The words "provided always, sub conditione, ita quod," used in a conveyance of real estate, by themselves, make the estate conditional. But in a lease for years, no precise form of words is necessary to make a condition. It is sufficient if it appear that the words used were intended to have the effect of creating a condition. They must be the words of the landlord, because he is to impose the condition. Here, first, the agreement purports to be in consideration of the rent and *conditions* thereafter mentioned; and then the words "it is stipulated" occur more than once; and then, in the last sentence of the instrument, come the words, "it is lastly stipulated and conditioned, that Watt shall not assign, transfer, underlet, or part with any part of the lands, otherwise than to his wife or children." These words are clearly introduced into the instrument on the part of the lessor, for they are for his benefit. The word *conditioned* is fairly a word of condition. In pleading, a bond is stated to be conditioned for payment of money. It is said that the word *stipulated* and the word *conditioned*, being used together, have the same meaning, and import a covenant, and not a condition; but there are several authorities which show that if words both of covenant and condition are used in the same instrument, they both shall operate. If the word *stipulated* import a covenant, it will operate as such; and if the word *conditioned* import a condition, it must also operate. In *Simpson v. Titterell*, Cro. Eliz. 242, one Benbow let the land to the defendant *proviso semper*, and it was further covenanted that the lessee should not assign except to the lessor. These words were held to create a condition; because it was a general rule that where a proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition; otherwise it is void; but if a penalty is annexed it is otherwise. So in *The Earl of Pembroke v. Sir H. Berkeley*, Cro. Eliz. 384, where there was a grant of a walk in a forest, "provided also, and the said grantee doth covenant not to fell or cut any wood but for necessary browse," and the heir of the grantee cut down four oaks, the question was, Whether this was a condition or a covenant. *Gaudy* and *Clench* thought it was a covenant only, but *Popham* and *Fenner* thought it was a condition; and afterwards upon a conference amongst all the justices of England, it was held by the greater part of them to be a condition. In *Harrington v. Wise*, Cro. Eliz. 486, where the words were, "It is covenanted and agreed between the parties that Harring-

ton doth let the lands for five years, *provided always*, that Wise shall pay to the defendant, during the term, 120*l.* per annum," it was held to be a good reservation of rent; but *Popham*, J., said that it was a reservation and condition also, as in the case of Sir H. Berkeley, where a provision joined with the words of covenant made it a condition and a covenant also. In Litt. s. 329, it is said, if the words be, "provided always, that B. do pay to A. such rents," the feoffee hath but an estate on condition. Lord Coke, in commenting on that section in Co. Lit. 203 *b*, says, So it is if a man by indenture letteth land for years; provided always, and it is covenanted and agreed between the said parties that the lessee shall not alien; and it was adjudged that this was a condition by force of the proviso, and a covenant by force of the other words. We are of opinion, therefore, that by the last clause of the instrument in question a condition was created; and that being so, the rule for a nonsuit cannot be made absolute. But we think the rule should be absolute for a new trial, because there was evidence to show that the land was underlet by the defendant with the consent and express license of the lessor, and that evidence was not submitted to the jury.

Rule absolute for a new trial.

#### WHYTT v. M'INTOSH and Others. — p. 317.

Where a defendant obtains a mandamus under 13 G. 3, c. 63, s. 44, for examining witnesses in India, the plaintiff, gaining the cause, is entitled to the costs of cross-examining those witnesses.

THE defendant in this case obtained a mandamus for the examination of witnesses in India. The plaintiff cross-examined those witnesses, but did not examine any witnesses in chief under the mandamus. At the trial in this Court the depositions were read; and the plaintiff having obtained a verdict, the Master, on the taxation of costs, allowed him the expense incurred in cross-examining the witnesses in India.

*Joshua Evans* obtained a rule to show cause why the Master should not review his taxation; against which, in Easter term,

*Wightman* showed cause. The statute 13 G. 3, c. 63, s. 44, which gives this Court power to issue writs of mandamus for the examination of witnesses in India, assumes that it confers a benefit on the party applying for the writ. It would, therefore, be very unjust if the opposite party should, as to the costs, be placed in a worse situation than if the witnesses had been brought here. If the act had not passed, and the witnesses had been brought here, the plaintiff gaining the cause would have had his costs. By means of the writ, the defendant has had the benefit of the testimony of his witnesses without the expense of bringing them, which is a sufficient reason why the plaintiff should not have to bear the expense of sending out to India to cross-examine those witnesses. The plaintiff was not a consenting party to the writ; the case, therefore, differs from *Stephens v. Crichton*, 2 East, 259, which was a case of examination upon interrogatories, that being, as Lord *Ellenborough* observed, "a matter of indulgence and consent."

*Joshua Evans*, contra. The act of parliament out of which this question arises is an old one, and the costs now in dispute have hitherto never been allowed. Nor can the plaintiff establish any claim to them unless they are to be treated as costs in the cause, and then it will follow that if the defendant had been successful he would have been entitled to the costs of the examination of his witnesses in chief. The question is, therefore, of no small importance. The plaintiff was at liberty to sue in

India; and if he prefers bringing his action in England, and on that account is put to greater expense, he has no cause for complaint. In courts of equity the commission to examine witnesses abroad issues in invitum, and the party asking it is compelled to pay the costs; but the expense of cross-examination is nevertheless borne by the party making it. Here the plaintiff might have opposed the writ, and asked the Court to impose terms as to the costs. All costs in actions are given by act of parliament, and they cannot be treated as costs in the cause unless the successful party is entitled to them, whichever they may be.

*Cur. adv. vult.*

On a subsequent day, in Easter term, the judgment of the Court was delivered by

LORD TENTERDEN, C. J. We have considered of this matter, and are of opinion that the rule for a review of the Master's taxation must be discharged. It was urged that it has not been usual to allow such costs as those now claimed; but if the plaintiff be entitled to them that is not a sufficient reason for now withholding the allowance. The Court had no power to refuse the mandamus. The defendant had a right to demand it under the statute 13 G. 3, c. 63; but that statute is silent as to the costs of such a proceeding; it is, therefore, in the breast of the Court to say whether the costs in question ought or ought not to be allowed. Now the defendant having obtained a mandamus to examine witnesses on his behalf, it was just that the plaintiff should have an opportunity of cross-examining them, and that he should be reimbursed the expense incurred in so doing. On this ground it seems to us that the Master did right in taxing those costs for the plaintiff.

Rule discharged.

END OF EASTER TERM.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

In the Ninth Year of the Reign of GEORGE IV.—1828.

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The KING v. ROBERT BROOKS.—p. 321.

Where a party had been sworn into, and had exercised a corporate office for more than six years, the Court, in the exercise of their discretion, and without deciding whether he was protected by the 32 G. 3, c. 58, refused to grant a quo warranto information against him, on the ground of his not having been sworn in before the proper officer.

IN last Hilary term a rule was obtained at the instance of one Payne, a burgess of Wells, calling upon Robert Brooks to show cause why an information in the nature of quo warranto should not be filed against him for usurping the office of a master of the city of Wells. The rule was granted on two grounds: first, that he was unduly elected, there not having been a sufficient number of electors present; secondly, that he had not been sworn in. By the affidavits it was stated, that by the governing charter of the corporation of the city of Wells it was provided that there should be one mayor and twenty-three capital burgesses who should be a common council, and that of those twenty-three, seven should be masters; that vacancies in the office of masters were to be filled up by election out of the capital burgesses, by the residue of the capital burgesses, or the greater part of them, and that the new master should take an oath of office before the mayor, recorder, and six other of the capital burgesses. And they further stated, that on the 6th of July, 1821, R. Brooks was elected a master at a meeting where the mayor, three masters, and seven capital burgesses only were present. That the recorder was not present there or at any time when the oath prescribed by the charter was administered to R. Brooks.

The affidavits in answer stated that R. Brooks was sworn in on the 13th of August, 1821, and had ever since exercised the office of a master of the city of Wells.

It was afterwards referred to the master of the crown office to inquire whether R. Brooks was sworn into the said office or not, and how he was so sworn.

The master now reported that "R. Brooks was sworn in on the 13th of August, 1821, not before the recorder of the borough, but at a convocation or meeting that was held at the town-hall of the mayor, masters, and capital burgesses of the borough, at which the recorder was not present."

Sir J. Scarlett and R. C. Scarlett, in support of the rule, contended that the statute 32 G. 3, c. 58, did not protect Brooks in this case. The

provision of that statute is, "that any defendant to any information in the nature of a quo warranto for the exercise of any office, &c., in any city, may plead that he had first actually taken upon himself, or held, or executed the office in question, six years or more before the exhibiting of such information, such six years to be reckoned and computed from the day on which such defendant so pleading was actually admitted and sworn into such office or franchise." The object of the statute appears to have been to remedy an irregular election; and hitherto it has been confined to that. There is no case where it has been held applicable to an undue swearing in. Swearing in before the wrong officer cannot be considered as a compliance with the charter; the party, therefore, must be treated as not sworn in; and if so, the statute cannot protect him, for the six years are to be computed from the swearing in. Again, by the stat. 55 G. 3, c. 184, a stamp is imposed upon the admission to a corporate office, and it does not appear that Brooks was admitted.

Lord TENTERDEN, C. J. As this gentleman has been in the actual exercise of the office in question for more than six years, I think we shall best exercise our discretion in giving effect to the spirit of the statute 32 G. 3, c. 58, by refusing to interfere. It is not necessary to give any opinion as to the construction of that part of the statute which speaks of "actually swearing in," for the Court is not bound to interfere at the instance of an individual; and as it was clearly the intention of the legislature that six years' enjoyment of a corporate office should secure the possession of it, I think we ought not to interfere. Rule discharged.

*Taunton and Campbell* were to have opposed the rule.

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GRIMMAN v. LEGGE. — p. 324.

A. demised to B. the first and second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, B. told A. that she would quit immediately. The latter answered that she might go when she pleased. B. quitted, and A. accepted possession of the apartments: Held, that A. could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent pro rata, for the actual occupation of the premises for any period short of the quarter.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last term, it appeared that in October, 1826, the plaintiff agreed to let to the defendant for a year from the 25th of December following, at a rent of 50*l.*, payable quarterly, the first and second floor of a house in York Street, Bryanstone Square. The defendant entered at Christmas, and paid a quarter's rent on the 25th of March, 1827. In April a dispute having taken place between the plaintiff and defendant, the latter said she would quit. The plaintiff said that she might go when she pleased, and he should be glad to get rid of her. The defendant began to remove her furniture on the following day, and continued removing it for three days. On the 19th of April, she delivered the keys of the rooms to the plaintiff, and he accepted them. Upon this, Lord Tenterden told the jury that the defendant was liable to pay the quarter's rent due at midsummer, 1826, unless there was an agreement between the plaintiff and defendant that the latter should quit without paying any rent, and he directed them to find for the defendant if they thought from the evidence that such an

agreement was made between the parties. The jury having found a verdict for the defendant,

*Campbell* now moved for a new trial. Assuming that there was evidence of a license given by the landlord to the tenant to quit, *Mollett v. Brayne*, 2 Camp. 108, shows that the landlord is entitled to recover the whole quarter's rent. There the landlord, having had a dispute with his tenant, told him that he might quit when he pleased; and the tenant accordingly quitted in the middle of the quarter: it was held that the landlord was entitled to recover in an action for use and occupation for the whole quarter, on the ground that a tenancy from year to year created by parol, cannot be determined by a parol license from the landlord to quit in the middle of a quarter, and the tenant's quitting the premises accordingly, because there is a subsisting term in the premises, which cannot be surrendered except by deed or note in writing, or by act and operation of law. [*Bayley, J.* There the plaintiff did not accept possession of the demised premises. A parol license to quit will not of itself operate as a surrender of the tenant's interest. But where the tenant gives up possession in pursuance of such a license, and the landlord accepts it, the license, coupled with the fact of the change of possession, operates as a surrender by act and operation of law, and the landlord cannot recover any rent which becomes due after his acceptance of the possession.] According to *Whitehead v. Clifford*, 5 Taunt. 518, the landlord could not recover the whole quarter's rent; but unless that which took place between the parties amounted to an eviction, the plaintiff must be entitled to rent pro rata. [*Holroyd, J.* Where, by express contract, rent is reserved, payable quarterly, the landlord cannot recover a proportionable part of the rent for the occupation of his premises for any period less than a quarter.] If the delivering up the keys by the plaintiff, and the acceptance of them by the defendant, was a surrender by act and operation of law, the express promise to pay the rent at the end of every quarter was at an end, and then a promise to pay pro rata may be implied.

LORD TENTERDEN, C. J. There was an express contract to pay a quarter's rent at midsummer; before that time arrived, some dispute arose between the parties. The tenant said to the landlord, I shall quit; and the latter said, You may do so, and I shall be glad to get rid of you. The defendant then removed her furniture, and sent the keys of the rooms to the plaintiff, and he accepted them. I thought that the jury might presume that the original contract between the parties was rescinded.

BAYLEY, J. *Whitehead v. Clifford*, 5 Taunt. 518, shows that the plaintiff cannot recover the rent for the whole quarter. But then it is said he is entitled to recover rent pro rata for so long a time as the defendant occupied his premises. Where there is an express contract between the parties, none can be implied. The plaintiff, therefore, having destroyed his right to recover the rent according to the contract, has destroyed it altogether. Where a party by agreement engages to pay freight on arrival at a specified port, and the ship never arrived at that port, but landed her cargo at an intermediate point, and it was accepted by the freighter: it was held that the plaintiff was not entitled to recover a proportionable part of the freight for such part of the voyage as the ship performed; because where there is an express contract, the law will not imply one, *Cook v. Jennings*. 7 T. R. 381. So in this case, the parties having entered into an express contract, by which the rent was to be paid quarterly, I think the law will not imply a contract to pay rent for any period less than a quarter.

Rule refused



## The KING v. The Justices of BERWICK-UPON-TWEED.—p. 327.

A rate in the nature of a county rate may be levied in Berwick-upon-Tweed, that being a place not subject to the commission of the peace of any county in England, and never having contributed to a rate made for any county, although it does not lie within the body of an English county, and although no rate had ever been levied there before, the corporation having defrayed out of their own funds the charges to which the sums raised by a county rate are applicable.

By charter reciting that the borough of Berwick-upon-Tweed was an ancient borough, and the mayor, bailiffs, and burgesses thereof an ancient corporation, King James the First granted that the said borough should be and remain a free borough, and that the men of the borough should be free burgesses, and that the mayor, bailiffs, and burgesses of the borough should be a body corporate, by the name of the mayor, bailiffs, and burgesses of the borough of Berwick-upon-Tweed, with power to make bye-laws for their government, and impose fines for breach of those bye-laws; that a coroner should be appointed by the mayor, bailiffs, and burgesses to do and execute everything which belonged to the office of coroner; and that they should be partakers of all assessments and charges with the rest of the burgesses of the borough, as often as the borough should be taxed for the good state and maintenance thereof; that the inhabitants not being burgesses, nor free of the borough, should be partakers in all assessments and charges in the borough reasonably made for the state and maintenance thereof; that the mayor, bailiffs, burgesses, and their successors, or the greater part of them, for the necessity and good of the borough, the goods and chattels of the burgesses, and of all other inhabitants of the borough and liberties thereof, as to them should seem best, should reasonably tax, and taxation and tallage impose, and the same taxation and tallage levy and cause to be levied as before in the borough used and accustomed without hinderance of the said king; that all sums of money arising by these taxes should be to the use of the chambers of the borough for the necessity, profit, and public good of the borough. The king then granted that the mayor, bailiffs, and burgesses might have within the borough a prison or gaol for the keeping of all prisoners committed within the borough or liberties; that the mayor of the borough for the time being, and the recorder, and such burgesses or aldermen as had sustained the office of mayor should be his majesty's justices to keep the peace within the borough, liberties, and precincts; and that they should have power to inquire, hear, and determine within the borough, &c., all manner of felonies, murders, &c., misdeeds, causes, and articles which did belong or might thereafter belong to the authority of justices of the peace of his said majesty, in as ample a manner as any justices of the peace in any of his majesty's counties within his majesty's kingdom of England, by the laws of the same kingdom for the offences so done in the said counties might be able to hear and determine. The king then gave the mayor, recorder, and aldermen a power to erect a gallows and execute felons, and granted them for their own proper use and behoof all fines imposed for any trespass or other offence committed within the borough, or before the mayor, recorder, and bailiffs in the court of the borough, and before the mayor, recorder, and the said aldermen, or any three or more of them, as justices of the peace or of gaol delivery within the borough; and further, all the seigniori, manor, borough, town, and sock of Berwick-upon-

Tweed, with all and singular their rights, members, and appurtenances, and all houses, &c., within the said seignior, manor, borough, town, and sock being, and also certain lands and fields to the borough adjoining (there described), to have and hold the said seignior, &c., and all other and singular the premises granted by the charter, with all their appurtenances, to the mayor, bailiffs, and burgesses, and their successors, to the only proper use and behoof of the said mayor, bailiffs, and burgesses of the said borough, and their successors in fee for ever, yielding to the king yearly for the seignior, &c., 20*l*. The charter was accepted by the corporation. The seignior, &c., so granted still remains the property of the mayor, bailiffs, and burgesses; the annual revenue arising from the seignior, &c. amounts to 12,000*l*., more than one half of that sum is annually divided among the burgesses, and widows of burgesses, resident in the borough, for their individual use and benefit. Besides paying all the charges and expenses borne by the mayor, bailiffs, and burgesses, their revenue is more than sufficient to pay all the sums which in the borough would be payable by and out of a rate in the nature of a county rate, if such a rate could be legally made and established in the borough. The borough and its liberties are bounded on the south by the river Tweed, on the east by the German ocean, and on the north by that part of the United Kingdom called Scotland. It did formerly lie within Scotland, and constituted one of the royal boroughs of that kingdom. It never did lie within any county in England, and is not now nor ever was a county of itself. No rate in the nature of a county rate was ever assessed or levied within the borough before the year 1828. At a court of quarter sessions, held on the 28th of April in that year, an order was made that a rate or assessment should be made upon the borough in the nature of a county rate, and that 150*l*. should be levied for and towards such a rate. The justices issued their warrant on the 30th of April to the high constable of the borough, commanding him to issue his warrant to the churchwardens and overseers of the poor of the parish of Berwick-upon-Tweed within his district, commanding them within thirty days after the receipt of the warrant, to pay to him the sum of 150*l*. so charged and assessed upon the said parish; and that upon receipt of the same, the said high constable should at or before the next quarter sessions pay the same into the hands of W. P., the treasurer appointed to receive the same. The borough and parish of Berwick-upon-Tweed are co-extensive. The fees of the gaoler of the borough on the acquittal of prisoners, and the fees of the clerk of the peace or town-clerk of the borough on the same account and for returns made by him to parliament, and the costs of prosecuting persons guilty of felony and certain misdemeanors within the borough for some time past, before the making of the said order, had been paid out of the poor-rates raised within the parish of Berwick under and by virtue of certain statutes in that case made and provided. The bridge over the Tweed, at Berwick, is kept in repair by the corporation by virtue of a contract with government, under which the corporation annually receive 100*l*. The corporation have always paid the following charges which in England are usually paid out of the county rate, namely, the gaoler's salary, and the expenses of erecting and repairing the gaol of Berwick, and of maintaining the prisoners therein; the expenses attending the execution of felons; the expenses of conveying convicts to the place appointed by his majesty's secretary of state in order to transportation, and of providing the standard weights and measures.

A rule nisi had been obtained for removing into this Court the order of sessions for making the rate in the nature of a county rate, and the warrant directed to the high constable to cause the same to be levied, upon the ground that the justices of Berwick-upon-Tweed had no power to make such a rate, inasmuch as the statute 55 G. 3, c. 51, s. 24, applied to such boroughs only as lie within the body of some English county; and, secondly, that even if Berwick were within the words of the act, it was not within the intent of the legislature, inasmuch as it had large revenues of its own, part of which had at all times been applied to those purposes to which a county rate is usually applied; and even if they were insufficient, the corporation had, by charter, a power of taxing the inhabitants.

*F. Pollock and Ingham* now showed cause. As to the first point, it is true that Berwick is not within any English county; but it satisfies every material requisite of the act. It is a part of the realm of England, *Rex v. Cowle*, 2 Burr. 834, and is declared by statute 20 G. 2, c. 42, s. 3, to be comprehended "in all cases where the kingdom of England is mentioned in any act of parliament." It has a separate commission of the peace, and is not liable to any county rate. These circumstances are said by *Le Blanc, J.*, in *Weatherhead v. Drewry*, 11 East, 176, to be all that are necessary to bring a place within the 18 G. 2, c. 18, s. 7, which extends the power of making a county rate to the justices in all places therein mentioned. By the statute 5 & 6 W. & M. c. 11, made perpetual by 8 & 9 W. 3, c. 33, every defendant removing an indictment for a misdemeanor from the court of quarter sessions is required to enter into a recognisance, conditioned to try the issue joined in the indictment at the next assizes for the county wherein the said indictment was found. Now it has always been the practice for the defendant, removing an indictment from the quarter sessions of Berwick, to enter into a recognisance to try the issue at the assizes for Northumberland; and Berwick has, therefore, for the purposes of that act, been taken to be within the county of Northumberland. *James v. Green*, 6 T. R. 228, and *Weatherhead v. Drewry*, 11 East, 168, show that there is no ground for the objection, that the revenues of the corporation should have been applied to defray those expenses for which the rate in question was imposed. The facts in this case are stronger in favour of the propriety of the rate than even in the cases of *Nottingham* and *Derby*, for the grant to each of those corporations was expressed to be to the intent that they should maintain the public charges of the town; but in the case of Berwick the clause of the charter confirming former grants, expresses them to be to the only proper use and behoof of the mayor, bailiffs, and burgesses, without any designation of the purposes to which they are to be applied.

The *Solicitor-General* contra. Berwick-upon-Tweed was formerly part of Scotland. It never formed part of any county in England; and that being so, neither the statute 55 G. 3, c. 51, s. 24, nor the 18 G. 2, c. 18, s. 7, authorizes the corporation of Berwick to levy on the inhabitants of that place a rate in the nature of a county rate. Those statutes only apply to places lying within the body of an English county. Each of them enacts, in nearly the same words, that where any cities, towns, or other places within that part of Great Britain called England, have commissions of the peace within themselves, and are not subject to the jurisdiction of the commission of the peace of the counties at large, in which such liberties or franchises lie, and do not, nor did before the passing of the act, contribute or pay to the several rates made for the said counties at

*large*, then it shall be lawful for the justices to make a rate in the nature of a county rate. The statute 20 G. 2, c. 42, s. 3, must be so qualified as to be held not to apply to cases where the legislature makes enactments for a county. Berwick-upon-Tweed not being a liberty or franchise lying in an English county, is not within the words of the statute, nor is it within the intent. For the mayor and burgesses have not only large funds in their possession to enable them to defray all the charges to which a county rate is usually applied, but they have the power of taxing the inhabitants, and thereby raising money for all those purposes to which a county rate is usually applied.

LORD TENTERDEN, C. J. I cannot entertain a doubt that it was the intention of the legislature, in the statutes 13 G. 2, c. 18, s. 7, and 55 G. 3, c. 51, s. 24, to include every place that had a jurisdiction of its own, and did not contribute to the county rate, and was not subject to the commission of the peace of any county. We ought to put such a construction on the words of the act as will best satisfy that intention. If the words used in their ordinary import are a little too narrow, we ought, in furtherance of the intention of the legislature, to extend them to meet a particular case. Berwick has a separate jurisdiction; it is not subject to the commission of the peace of any county, and does not, nor did, before the passing of the statute 55 G. 3, c. 51, s. 24, contribute or pay to the rate made for any county. The words are, "did not pay or contribute to the rates made for the said counties at large." I think we must understand the words "said counties at large," to mean any county at large. Berwick-upon-Tweed does not, indeed, lie within any English county, but that is immaterial. Any town or place which has a separate jurisdiction, and is not subject to the commission of the peace of any county, and does not contribute to the rate made for any county, is within the act, although it may not be within the body of an English county. As to the other point, it is established by *Weatherhead v. Drewry*, and *James v. Green*, that if the justices of Berwick had jurisdiction to make the rate, this Court will not inquire into the necessity or propriety of making it. The rule for a *certiorari* must, therefore, be discharged.

Rule discharged.

### BARNARD PINNEY v. JOEL PINNEY. — p. 335.

In *trover* for a chattel claimed by the plaintiff, as vendee of an executor, the will is not evidence of the title of the executor. The probate must be produced.

*TROVER*, for a horse and gig. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last Easter term, the following appeared to be the facts of the case: — The defendant's father died in March, 1827, having left several testamentary papers. Francis Pinney, the defendant's brother, claimed to be executor, and the defendant

also. The Ecclesiastical Court, at the time of the trial, had not granted probate of any of the wills. Francis Pinney sold to the plaintiff the horse and gig, (which had been part of the property of the testator;) but before and after such sale, the defendant frequently used it, and finally carried it away, and converted it to his own use. Francis Pinney, being called as a witness, stated that he was one of the executors of his father, and that he sold the horse and gig to the plaintiff. The plaintiff then offered to give in evidence the wills or testamentary papers by which Francis Pinney was appointed executor. It was objected, that a will of personal estate was of no effect until probate; that it was no will until it was allowed as such in the spiritual court, it being for that court to judge whether it be a will or not. (a) Lord *Tenterden*, C. J., held the production of the probate to be necessary to prove the title to personal property under the will, and refused to receive the will itself. No probate having been produced, he said, that if the plaintiff had proved a clear, undisputed possession, it might have been sufficient; but here it appeared, that the defendant before and after the sale to the plaintiff used the horse and gig. The plaintiff had no exclusive possession, and Francis Pinney could have no title as executor, unless the will was allowed by the spiritual court, and probate was obtained. The plaintiff elected to be nonsuited.

*Gurney* now moved for a new trial; and contended, that one of several executors might, before probate, sell the property of the testator, and give a good title to the vendee, and that before probate the will must be the only evidence of the right of the executor. [*Bayley*, J. When the probate is granted, then, by virtue of the will, all the property of the testator vests from the time of his death in the executor; you did not prove that Francis Pinney was an executor, for no probate was proved. Non constat that the will under which he claimed to be executor is a valid will, unless it be allowed as such by the Ecclesiastical Court. Here the horse and gig were delivered to the plaintiff, who had no title to them.]

Lord *TENTERDEN*, C. J. I thought at the trial, and I am still of the same opinion, there was no proof of title in the plaintiff.

Rule refused.

(a) *Chaunter v. Chaunter*, cited in *Viner, Executors*, (A a.) 20, and 4 *Burn. E. L. Wills, Probate*, 7.

### JONES v. KENRICK. — p. 337.

By the Welsh judicature act, 5 G. 4, c. 106, s. 21, it is enacted that in all transitory actions which shall be brought in any court of record out of the principality, and the debt or damages recovered shall not amount to 50*l.*, and it shall appear on the evidence given on the trial that the cause of action arose in the principality, and that the defendant was resident in Wales at the time of the service of any writ or other mesne process served on him in such action, and it shall be so testified under the hand of the Judge who tried the cause, a judgment of nonsuit shall be entered: Held, that it is discretionary in the Judge who tries the cause to grant or refuse the certificate mentioned in the act; and that where the Judge has refused to certify, this Court has no power to order a judgment of nonsuit to be entered.

Held, by Lord *Tenterden*, C. J., at *Nisi Prius*, that it lies upon the defendant to show that he was residing in Wales at the time when the writ or mesne process was served on him in the action, and that general evidence that his usual place of residence both before and subsequent to the commencement of the action, was in Wales, is not sufficient.

**ASSUMPSIT** for goods sold. *Plea, non assumpsit.* At the trial before Lord *Tenterden*, C. J., at the Middlesex sittings after last Easter term, it appeared that the action was brought to recover 9*l.*, the price of certain vermin traps sold by the plaintiff to the defendant. The sale was made, and the delivery took place, in the principality of Wales, where the defendant resided at the time of the sale and delivery, and had generally resided ever since. The jury found a verdict for the plaintiff to the amount of 9*l.* The counsel for the defendant then applied to Lord *Tenterden*, C. J., to certify, on the back of the record, that the cause of action arose in the principality of Wales, and that the defendant resided there at the time of the service of the writ, in order that a suggestion might be entered on the roll under the 5 G. 4, c. 106, s. 21; (a) but his Lordship said, that if the defendant was served with the writ while he resided out of the principality of Wales it was not a case within the act of parliament, and that it lay on the defendant to show, that at the time when the writ or process was served on him he was actually residing in Wales; and there being no such evidence, his Lordship refused to certify.

*Brougham* now moved to enter a nonsuit. The damages recovered not having exceeded 50*l.*, the defendant is entitled to a judgment of nonsuit. The act of the 5 G. 4, c. 106, s. 21, only says that the defendant must be *resident* in Wales at the time of the service of the writ. Here it was proved that his usual place of residence was in Wales. Assuming, therefore, that the defendant was not actually in Wales at the time of the service of the writ, still it is sufficient if his usual place of residence was there. The act does not confine the remedy to cases where the party is actually in Wales at the time of the service of the writ, but to cases where he is resident in Wales. Now, suppose a party, whose usual place of residence is in Wales, to come into an English county for a temporary purpose; as, for example, a physician to attend a patient, and to be served with a writ while he remains in the English county, surely that would be a case within the act of parliament, for the party in that case, though actually in an English county, would be resident in Wales at the time of the service of the writ.

**LORD TENTERDEN**, C. J. The defendant by the act of parliament is to have a judgment of nonsuit, if it shall be testified under the the hand of the Judge who tries the cause, upon the back of the record of *nisi prius*, that the defendant was resident in Wales at the time of the service of the writ. It is discretionary in the Judge to grant or refuse a certificate. Here the Judge who tried the cause has not certified. The Court, therefore, has no power to order such a judgment to be entered.

Rule refused.

(a) By sect. 21 of that statute it is enacted, that in all actions upon the case for words, action of debt, &c., and all transitory actions which shall be brought in any of his majesty's courts of record out of the principality of Wales, and the debt or damages found by the jury shall not amount to the sum of 50*l.*, and it shall appear upon the evidence given on the trial of the said cause that the cause of action arose in the principality of Wales, and that the defendant was resident in the dominion of Wales *at the time of the service of any writ or other mesne process served on him in such action*, and it shall be so testified under the hand of the Judge who tried such cause upon the back of the record of *Nisi Prius* (on such facts being suggested on the record or judgment-roll), a judgment of nonsuit shall be entered thereon against the plaintiff, and the plaintiff shall pay to the defendant in such action his costs of suit, &c.

## LESTER v. JENKINS. — p. 339.

Declaration upon a bill of exchange, drawn on the 29th November, 1827, payable two months after date, was entitled generally of Hilary term, 1828: Held, that it was competent to the plaintiff to prove by the parol evidence of the attorney (without producing the writ) that the action was commenced after the 1st of February, when the bill became due.

ASSUMPSIT by the indorsee against the defendant, as acceptor of a bill of exchange bearing date the 29th of November, 1827, payable two months after date. At the trial before Lord *Tenterden*, C. J., at the London sittings after last Easter term, it appeared that the declaration was entitled generally of Hilary term, and that the bill of exchange became due on the 1st of February. It was contended, on the part of the defendant, that as the declaration was entitled generally of the term, it related to the first day of the term, and that the action, therefore, appeared to have been commenced before the cause of action accrued. The plaintiff's attorney then proved that he did not receive his instructions to commence the action until the bill had been dishonored, and that he took no proceedings until after the first of February. It was insisted that this evidence of the time of the commencement of the suit was not admissible, but that the writ itself ought to have been produced. Lord *Tenterden*, C. J., overruled the objection, and directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

*Brodrick* now moved accordingly. A declaration entitled generally of the term relates to the first day of the term. It was formerly doubted whether any evidence could be given to contradict the record, but it must now be admitted, that the time of the commencement of the suit may be shown to be different from that which it appears to be by the record, *Morris v. Pugh and Harwood*, 3 Burr. 1241, *Granger v. George*, 5 B. & C. 149. The usual and proper mode of proving the time of the commencement of an action is by producing the writ. It cannot otherwise be shown that the writ was sued out in the particular cause. Nor can parol evidence of the contents of the writ be properly received.

LORD *TENTERDEN*, C. J. The indorsement on the writ is no more than the declaration of the attorney in the case.

BAYLEY, J. The memorandum is prima facie evidence of the time of the commencement of an action, and, uncontradicted, is conclusive. But it is clearly established by authorities that either party may show by evidence the actual time of the commencement of the suit to be different from that which it purports to be by the record. The only question in this case is, Whether that can be shown by any other medium of proof than the writ. I cannot entertain any doubt upon that point. A party cannot prove the contents of the writ without producing it; but he may prove the time when the action was commenced, without proving the contents of the writ. Rule refused (a.)

(a) See *Wilton v. Girdlestone*, 5 B. & A. 847. *Lytleton v. Cross*, 3 B. & C. 317.

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The KING v. SMITH and Two Others. — p. 341.

Where an indictment for a conspiracy alleged, that "at the court of quarter sessions holden, &c., an indictment against A. B. was preferred to, and found by the grand jury:" Held, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up.

INDICTMENT for a conspiracy. The second count stated, that at the general quarter sessions of the peace holden at, &c., on, &c., before certain of his Majesty's justices assigned, &c., a certain bill of indictment against Henry Smith, for a certain felony therein mentioned, was duly preferred to and found by a certain grand jury of the county then and there duly assembled in that behalf, and that it then and there became and was material and necessary to examine one W. B. as a witness in support of such indictment, and that defendants conspired to prevent W. B. from attending and being examined, &c. The third and fourth counts began in like manner, by stating that a bill was preferred and found at the quarter sessions. There were several other counts in the indictment not material to be noticed. Plea, not guilty. At the trial before *Vaughan*, B., at the Summer assizes for Monmouthshire, 1827, the prosecutor, in order to prove the allegation that a bill was found against H. Smith, called the deputy-clerk of the peace, who produced an indictment indorsed a true bill, but there was no general heading or caption to it. For the defendants, it was objected that this could not be admitted for want of a caption. The witness then stated, that it was not the practice to make up the records in form until they were desired to do so, but that in his book minutes were made of the proceedings from which the records were afterwards made up. The book was produced, and the following minute read: "Monmouthshire sessions, 10th July, 1826. At the general quarter sessions of the peace held at Usk, in and for the said county, this 10th day of July, 1826, before A. B., C. D." &c. &c. Then followed minutes of the business done at those sessions. The learned Judge received this as evidence of the caption of the indictment against H. S., and two of the defendants were found guilty on the second, third, and fourth counts above mentioned. In Michaelmas term, *Ludlow*, Serjt., obtained a rule nisi for a new trial, on the ground that the minute-book of the deputy-clerk of the peace ought not to have been received in evidence to prove the finding of the bill.

*Russell*, Serjt., *Maule*, and *Watson* showed cause. The finding of the bill at the quarter sessions was sufficiently proved by the minute-book, without producing a record of the caption regularly drawn up. Such minutes have frequently been received in evidence when it has appeared not to be the practice of the court to draw up the records in form, *Rex v. Hains*, Co nb. 337; *Fisher v. Lane*, 2 W. Bl. 834. [Lord Tenterden, C. J. The minutes there received were of the proceedings of inferior courts; the court of quarter sessions is a court of oyer and terminer, and is not a court of inferior jurisdiction.] In *Rex v. Tooke*, 25 St. Tr. 446, the minutes of the court were received to prove the acquittal of Hardy.

LORD TENTERDEN, C. J. It appears to me that the evidence given was not sufficient to sustain the allegation that an indictment against H. S. was found at the quarter sessions, which is a court of oyer and terminer and a court of record. In order to prove the finding of an indictment, it has always been the practice to have the record regularly drawn up, and to produce an examined copy. If any other evidence were allowed, I do not know how we could say that a conviction or acquittal might not also be proved by the minutes in the book kept by the clerk of the peace. That would be to break through the established rules of evidence, which is always a dangerous course. I therefore think we are bound to say that the evidence was not sufficient, and that as to the



two defendants who were found guilty there must be a new trial. The case of *Rex v. Tooke* is distinguishable; for there the matter proved by the minutes occurred before the same court sitting under the same commission.—BAYLEY, J. I am of the same opinion. The caption is a necessary part of the record; and the record itself, or an examined copy, is the only legitimate evidence to prove it. Rule absolute.

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Ex parte BAXTER.—P. 344.

Where a party, committed by commissioners of bankrupt for not answering to their satisfaction, wishes to be again brought before them, he must bear the expense of that proceeding.

PLATT moved for a mandamus to commissioners of bankrupt to bring up Baxter from custody for examination before them. It appeared by the affidavit on which the motion was founded that Baxter had been examined before them touching the property of a bankrupt, and was committed for not answering to their satisfaction. He afterwards sent word to them that he was prepared to make further answers, and requested to be brought before them for that purpose.

*Per Curiam.* The object of the application appears to be to avoid the expense of a writ of habeas corpus, and throw upon the estate of the bankrupt the costs of bringing this party before the commissioners. But the Court have no authority to do that: he was committed for his own misconduct, and must bear the expense of being brought before the commissioners; for which purpose he may apply for a writ of habeas corpus when he thinks fit. Rule refused.

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TEAGUE v. HUBBARD. — p. 345.

A member of a joint-stock company was employed by the company as their agent to sell goods for them, and received a commission of two per cent. for his trouble, and one per cent. *del credere* for guarantying the purchaser. Having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his, the drawer's, own order, and after it had been accepted he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company: the company were then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him ten shillings in the pound upon the amount of the bill, by way of composition: Held, first, that the indorsee, being a member of the company, could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company, and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account.

DECLARATION by the plaintiff as indorsee against the defendant as drawer of two bills of exchange; counts for money had and received. &c. Plea, general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term, 1827, the following appeared to be the facts of the case: The plaintiff was a shareholder and managing director of the Cornish Tin-Smelting Company. The defendant was a shareholder in that company, and also acted as the agent of the company in the sale of tin, receiving a commission of two per cent. for effecting sales, and an additional *del credere* commission of one per cent. for guarantying the purchaser. Having sold a quantity of tin on account of the company to one Richard Conness, he, on the 1st of April, 1826, drew two bills of exchange upon Conness, one for 200*l.*, and the

other for 133*l*. The 200*l*. bill was in the form following: "Two months after date, pay to my order 200*l*., value received." This bill was accepted by Conness, indorsed by Hubbard to W. Mears, who was the actuary of the company, and by the latter to Teague. The other bill, which was for 133*l*., was precisely in the same form, and had similar indorsements. The plaintiff purchased tin for the company, and at the time when the bills were indorsed to him, the company were indebted to him in a sum exceeding the aggregate amount mentioned in the two bills. The plaintiff was debited in his account current with these bills. Conness became insolvent before they became due. The plaintiff failed in proving due notice of dishonor of the bill for 133*l*., but proved that the defendant had received from Conness ten shillings in the pound upon the amount of that bill. It was objected, on the part of the defendant, that as the bill for 200*l*. was drawn and indorsed by the defendant on account of the company, the plaintiff being a co-partner could not sue upon it as indorsee; and that he could not recover from the defendant the money received by the latter on account of the bill for 133*l*., because that money was received by him in his character of a member of the company, and not in his individual character. Lord *Tenterden* directed the jury to find a verdict for the plaintiff for the amount of the bill for 200*l*., and of the composition received by the defendant on the other bill, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

*Campbell and Chitty* showed cause. The defendant was employed by the company to sell tin for them, and received a *del credere* commission. He sold tin to Conness, and he drew the bills in question upon Conness for the price of the tin, and the latter accepted them. The bills were drawn by the defendant, not as a member of the company, but in his individual character, to secure the payment of a sum of money for which, in the event of Conness becoming insolvent before the bills became due, he would be responsible. If he drew the bills in that character, he indorsed them in the same character on his own account to Mears, and the latter, although a member of the company, might have maintained an action against Hubbard. At all events, the bills were indorsed by Mears to the plaintiff for a valuable consideration. The plaintiff bought tin for the company, and at the time when the bills were indorsed to him the company were indebted to him in a sum exceeding the amount of the bills. The plaintiff had an account current with the company, and was debited in that account with these bills. He did not hold them as a member of the company, but in his individual character as an indorsee for value. Secondly, assuming that the plaintiff cannot recover on the bill for 200*l*., he is entitled to recover on the count for money had and received the amount received by the defendant on the bill for 133*l*. That money was received by the defendant in his individual character, and not as a member of the company. He received it for himself as drawer of the bill, and having received that part from the acceptor, it is money had and received to the use of the indorsee.

*F. Pollock and Follett*, contra. The question in this case must be considered wholly independent of the *del credere* commission. First, Was the contract contained in the bills of exchange made by the defendant in his individual character, or in that of a member of the company? The company or partnership consisted of the plaintiff, the defendant, and Mears. Whether or not there were other partners did not appear. The form of the bills is material. It is "pay to my order."

That must have meant the order of the partnership, the debt being due to the concern. The whole transaction shows that the bills were drawn on account of the company, for they were drawn for the price of the goods of the company sold to the acceptor by the defendant, and indorsed by him to Mears, the actuary of the company, and by him as actuary to the plaintiff. If then the plaintiff was acting as one of the partners, as there can be no doubt that one partner may draw a bill on behalf of the firm, the firm are liable: *Pinkney v. Hall*, 1 Ld. Raym. 175; *Smith v. Jarves*, 2 Ld. Raym. 1484; *Lord Galway v. Matthew*, 1 Camp. 403, 10 East, 264. These clearly were bills drawn by the partnership, and in whatever way the plaintiff, one of the partners, became entitled to them, he cannot sue another partner upon them: *Mainwaring v. Newman*, 2 Bos. & Pul. 120; *Moffat v. Van Millengen*, 2 Bos. & Pul. 124 n; and *Neale v. Turton*, 4 Bing. 149. [Lord Tenterden, C. J. Assuming that the bills are to be considered as drawn by the company, and that the plaintiff, therefore, cannot sue the defendant on the bills, yet here he, being one of several partners, has guaranteed a debt to the firm, and has received from the debtor a part of the debt, may not the other partners maintain an action against him for the money so received? Has not the plaintiff in this case a right to say that the money received by the defendant on account of one of these bills was received by him not in the character of a partner but in his individual character, and to relieve himself from a payment he would by virtue of his guaranty be liable to make to the partnership? Although the plaintiff cannot recover on the bill itself by reason of the partnership, may he not recover the sum actually received by the defendant, the receipt of the money not being a partnership transaction?] The defendant received the money as agent for all the members of the partnership, the plaintiff being one. The plaintiff, therefore, cannot sue the defendant, his copartner, for money received by him on account of the partnership. *Cur. adv. vult.*

The judgment of the Court was now delivered by

LORD TENTERDEN, C. J. This was an action against the defendant as drawer of two bills of exchange, and for money had and received. It appeared that the bills were signed by the defendant, and indorsed by him to Mears, who was the actuary for a mining company, and by the latter to the plaintiff. Notice of the dishonor of one of the bills was not proved; but it appeared that the defendant had received 10s. in the pound from the acceptor on the other bill, and for that sum a verdict was taken on the count for money had and received. It further appeared, that both the plaintiff and defendant were members of the mining company. If, therefore, the plaintiff could recover on these bills, it would be a recovery by one joint contractor against another, and then the defendant would have a right to call upon the plaintiff for contribution. It is clear, therefore, that no action can be maintained upon the bills; but during the argument, I thought the verdict taken on the count for money had and received might be sustained. Upon further consideration, however, we think that the defendant must be taken to have received the money, not in his individual capacity, but as a member of the trading company; and that being the case, if the plaintiff were allowed to recover it in this action, the same consequence would follow; the defendant would have the same right to call upon the plaintiff for contribution, as if the verdict had been taken on the count framed upon the bill. For these reasons we are of opinion that a nonsuit must be entered.

Rule absolute

## The KING v. PULSFORD.—p. 350.

Where an election to an office in a corporation was to be made by a select body appointed by the charter to be aiding the mayor: Held, that the mayor was not bound to give to the members of such select body specific notice of a meeting to be holden for the purpose of such election; but that a reasonable and usual notice requiring them to attend at a meeting of the corporation at a time specified, without stating for what purpose the meeting was called, was sufficient.

Quo warranto information for usurping the office of a capital burgess of the city of Wells. Plea, that by the governing charter of the borough there are to be one mayor and twenty-three burgesses, who shall be called the common council, and of those twenty-three, seven to be called masters of the city; and the common council are to be aiding and assisting the mayor from time to time in all causes and matters touching and concerning the city; and whenever a vacancy occurs in the sixteen common counsellors, not being masters, it is to be filled up by the other common counsellors then surviving, or the major part of them, &c. Averment, that on, &c., a vacancy happened, and that defendant was duly nominated and elected by the mayor and major part of the capital burgesses there and then duly assembled for that purpose, after due notice in that behalf. Replication, that due notice of the assembling of the mayor and capital burgesses for the purpose of electing a capital burgess was not given. Issue thereon. Many other issues were joined not material to the question decided by this Court. At the trial before *Best*, C. J., at the Somersetshire Summer assizes, 1827, it appeared that the following notice in writing was given to each capital burgess for the meeting at which the defendant was elected:—

“ Sir, — You are requested to attend a meeting of the corporation on, &c., at                      o'clock.                      ”

“ By order of the mayor,  
“ A. B., town clerk.”

The Lord Chief Justice held that this notice was insufficient, and the election therefore invalid, and directed a verdict for the crown. In Michaelmas term a rule nisi for a new trial was obtained; against which, on a former day in this term,

*Taunton, Campbell, C. F. Williams, and Bayly*, showed cause. If it was necessary that the purpose for which the meeting was held should be specified in the notice, that given was clearly insufficient. Now there are several authorities showing that a corporate meeting cannot be well holden for the purpose of an election unless notice of the business to be transacted there is given. The case of *Rex v. Hill*, 4 B. & C. 426, is not exactly in point, for there the election was by the body at large, and not by a select body; but each of the learned Judges there laid it down as a rule that whenever a meeting for the purpose of an election is held on a day not appointed by the charter, notice of the meeting, and of the purpose for which it is assembled, must be given to every person resident within the limits of the borough, and entitled to vote at the election. This rule is consistent with the cases of *Rex v. The Mayor, &c., of Shrewsbury*, Cas. temp. Hardw. 147; *Rex v. Mayor, &c., of Carlisle*, 1 Str. 385; *Rex v. Mayor of Liverpool*, 2 Burr. 723; *Rex v. Mayor of Doncaster*, 2 Burr. 738. It is also recognised in *Rex v. Theodorick East*, 543, where it was held that when all persons entitled to vote

present, and consenting, they might proceed to an election without previous notice.

*R. C. Scarlett*, and *Carter*, contra. In *Rex v. Hill*, the Court are certainly represented to have said, that where a meeting for an election is held not on a charter-day, notice of the meeting, and of the purpose for which it is holden, must be given. But that question was not raised upon the pleadings, and the point decided was, that a custom to give notice of corporate meetings by ringing a bell was, under the circumstances of that case, unreasonable. Several cases were mentioned in the argument there, which were supposed to support the assertion that a specific notice of the business to be transacted at a corporate meeting must be given, but when examined, they rather contradict than support it. In *Rex v. Mayor of Shrewsbury*, Lord *Hardwicke* quotes the opinion of Lord *Parker* and the whole Court, "that when the acts are to be done by a select number, notice must be given of the time of meeting, and that it is to do some corporate act, though *what particular act need not be specified*." The decision in *Rex v. Carlisle* was merely this, that where certain members of a corporation forming a select body are to act as a select body, they must be summoned to attend in that capacity. In *Rex v. The Mayor of Liverpool*, a question was raised as to notice of the business to be done, but the case was not determined on that point. In *Rex v. Wake*, 1 Barnard, 80, it was held, that where notice was given of a corporate meeting for one purpose, the parties assembled could not go on to other business unless the whole body were met, and did it by consent. That was very reasonable, and quite different from this case, for the notice there virtually excluded all business but that specially mentioned.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J. The point on which this cause was decided at *Nisi Prius* was the supposed insufficiency of the notice of holding the meeting at which the defendant was elected. Now, it appears that some days before the meeting, a notice in writing, signed by the town clerk, and importing that it was sent by the mayor, was delivered to each elector, requiring his attendance at a corporate meeting, on a certain day, at a particular hour, but not specifying the purpose for which the meeting was about to be holden. The Lord Chief Justice of the Common Pleas was of opinion that the purpose should have been specified, and on that ground directed that a verdict should be entered for the crown; and it has been since contended here, that as the meeting was held for an election, that should have been stated in the notice. It would be very difficult to maintain that the object of the meeting must be stated, where it is for an election, and not where it is for other purposes. Many cases were cited in argument as in point, but, upon a review of them all, it appears that there is not any one decision proceeding on the ground that specific notice was necessary, although certainly there are dicta to that effect, as well as to the contrary. In *Rex v. Hill*, the election was by the body at large, which is a very different thing. And even in that case, although each of the learned Judges expressed an opinion that the purpose for which the meeting was held should have been mentioned, yet, laying that point entirely out of consideration, the judgment stands good on other grounds. The point expressly decided was, that the notice

given, as stated in the pleas, was not a reasonable notice, of which there could be no doubt; for, consistently with every allegation on that record, the bell which was to give notice might be rung for a few minutes only, and those assembled might, as soon as it ceased, immediately proceed to an election, before the members residing at a distance could possibly attend. The present is the case of an election by a select body, and we are of opinion that it was not necessary in the notice to them to state the purpose of the meeting. But although we are of that opinion in this case, we avoid giving any opinion as to an election by a corporate body at large. The difference between them is this: the select body are appointed to be aiding and assisting the mayor on all occasions concerning the city, when required so to do. It is, therefore, their duty to attend whenever the mayor gives them reasonable notice that their attendance is required; and we think they are not at liberty to say that they abstained from attending because they did not know the specific purpose for which the meeting was about to be holden. If, indeed, it had appeared to be usual in this borough to give a more precise notice, the case would have been very different; but nothing of that kind is suggested. For these reasons, then, we think that the notice was sufficient, and that there must be a new trial.

Rule absolute.

The KING v. The Commissioners of Sewers for the Levels of PAGHAM, and certain other Places in the County of SUSSEX. — p. 355.

Where commissioners of sewers, acting bona fide for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against, and injure the adjoining land not within the levels: Held, that they could not be compelled to make compensation to the owner of the land, or to erect new works for his protection; for that all owners of land exposed to the inroads of the sea, or commissioners of sewers, acting for a number of land-owners, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others.

A RULE had been obtained calling upon the commissioners to show cause why a mandamus should not issue, directed to them, commanding them to issue a precept to the sheriff of the county of Sussex to summon a jury for the purpose of inquiring what hurt, loss, or disadvantage hath been sustained by W. Cosens, by reason of certain groyne and other works erected and made by the said commissioners within the limits of the said levels, and of assessing and ascertaining the compensation to be paid to the said W. Cosens for the same; or to erect and make such other works as should be necessary and sufficient to prevent further injury being done to the premises of the said W. Cosens, by reason of the said groyne and other works above mentioned.

The rule was obtained on affidavits which stated that Cosens was owner of certain lands on the sea-shore of Sussex, abutting on the west on the levels above mentioned; that, thirty years ago, he erected a mill 100 yards from high water mark, and that about that time the commissioners altered the groyne and other works, which had been before erected to protect the levels against the inroads of the sea, by taking away several small groyne, and erecting one large groyne in lieu thereof, at the easternmost point of the levels, and adjoining his (Cosens's) land That

the effect of this groyne was to cause the sea to flow with increased force against his land; and that in consequence thereof his land had been gradually washed away until high water mark was within fifteen yards of his mill. That his property was thereby much reduced in value, and that he had made application to the commissioners for compensation and protection, but without effect.

The affidavits in answer stated that the sea was making encroachments on the whole of that part of the coast, and that no part of it could be secure unless groynes or other works were erected for its protection. That the groyne adjoining Cosens's land was essential to the safety of the levels placed under their care; that before it was erected they had endeavored to ascertain the best position and shape for it, and had made it merely with a view to the protection of the levels, and not for the purpose of injuring Cosens. That the effect of every groyne was to make the water flow with greater force against the land to the eastward, but that if Cosens erected proper groynes for his own security his property would not be injured.

*Gurney, Thesiger, and Capron*, showed cause, and contended that the commissioners had no power to grant compensation to Cosens. Their commission extends only to lands within the level, and the statute does not enable them to summon a jury to assess the quantum of damage sustained by any person not having lands there. Neither can they be compelled to make new works for Cosens' protection; they have acted bonâ fide, to the best of their skill and judgment in the execution of their duty towards the owners of the lands within the level; and if they have not exceeded the powers vested in them, nor have acted wantonly and oppressively, to the injury of Cosens, they are not responsible for the consequences of their acts.

*Brodrick*, contra. The question is of great importance; for although the works erected by the commissioners may be for the benefit of the level, they are certainly very injurious to Cosens; and if he cannot obtain redress by this mode, he is altogether without remedy. No action will lie against the commissioners, they are protected by the commission; but it was distinctly said by the Court in the case of *Cardiffe Bridge*, 1 Salk. 146, that commissioners of sewers are subject to the inspection of this Court by writ of mandamus; and that they are to exercise a legal, not an arbitrary discretion, is laid down as an established principle of law in *Rook's case*, 5 Co. 100, and *Keighly's case*, 10 Co. 140. The commissioners might, in the first instance, have made compensation to Cosens; for when the groyne was made, they had to summon a jury to ascertain the expense, and the proportions in which it was to be borne; compensation to a party who would be injured by the work might very fairly have been considered as a part of the expense, and in that mode justice might have been done. In *Callis on Sewers*, 104, it is said, "Ubi nova sit maris incursio, ibi novum est apponendum remedium, with this caution, that under the pretence of the common weal, a private man's welfare be not intended, to the charge, trouble, and burthen of the county; and with this also, that where any man's particular interest and inheritance is prejudiced for the commonwealth's cause, by any such new-erected works, that that part of the county be ordered to recompense the same, which have good thereby." Mr. Cosens, then, having been injured by the new groyne made for the benefit of the level, ought to be compensated by the owners of the land within the level. But, admitting that there may be a difficulty in summoning a jury now to inquire into the

damage sustained, and making compensation, there can be none in granting a mandamus commanding the commissioners to erect such new works as are necessary for the protection of Cosens's land or to restore the ancient works. In *Rex v. Severn Railway Company*, 2 B. & A. 646, this Court commanded them to restore a rail-road which had been taken up; and in *Rex v. The Vice-Chancellor of Cambridge*, 3 Burr. 1660, *Wilmot, J.*, as to granting a mandamus, said, "If there is a clear right, the Court ought to find out a suitable and adequate remedy, and even to make a precedent, if they cannot find one; for where there is a right, law and justice require that there should be some remedy or other." Here, then, Cosens has sustained damage in consequence of the groyne erected by the commissioners. Further damage will ensue unless new works for his protection are erected; and the question in effect comes to this, viz., at whose expense those works ought to be erected. It is but just that they who have occasioned the injury should pay for the remedy; and if so, the Court will find a mode of compelling them to do it.

LORD TENTERDEN, C. J. I am of opinion that this rule must be discharged. At the time when the motion was made, the Court expressed great doubt whether it could be sustained. The matter has now been fully discussed, and the counsel for Mr. Cosens concluded by observing that it was reduced to this question — Who is to bear the expense of erecting the works necessary to protect Cosens's land? And I think he is perfectly correct in considering that as the substantial question. Let us see, then, how the matter stands. The commissioners of sewers, for the protection of that land which it was their duty to protect, have erected a certain work. It is not pretended that in so doing they did not exercise, at least, an honest discretion; and, looking at the affidavits on the one side and on the other, it is not by any means clear that they did not do the very best thing that, under the circumstances, could be done to attain the object they had in view. But it is contended that this new groyne has caused the sea to flow with greater violence against the land of Mr. Cosens, and make a greater inroad upon it, than possibly it might otherwise have done; and that as the commissioners, acting for the benefit of the level, have occasioned this damage, they must make compensation for it. It may be conceived that such is the effect of the groyne; but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavor to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. If we were, in this instance, to say that the commissioners for the level in question were bound to erect a groyne for Mr. Cosens, it might, and probably would, cause injury to the land lying to the eastward in the same manner as that erected for the protection of the level has caused injury to Mr. Cosens; and the owner of the land lying eastward of Mr. Cosens would have a right to call upon the commissioners to protect him also. In like manner each successive proprietor of land lying to the eastward would be entitled to claim protection, and the commissioners might be compelled to erect defences against the sea along the whole line of coast from the



level of Pagham to the North Foreland; for so far, I believe, the sea is making inroads upon the land. The extent to which the principle must be carried, if once admitted, satisfies me that it cannot be sustained in reason or in law. I am, therefore, of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy. For these reasons, the rule for a mandamus must be discharged.

BAYLEY, J. I am entirely of the same opinion. It seems to me that every land-owner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose; and the commissioners may erect such defences as are necessary for the land intrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention, to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment, for an abuse of the powers vested in them. But if they act *bonâ fide*, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. It has been argued that Mr. Cosens, having sustained damage from the groyne erected by the commissioners, is entitled to compensation. I do not agree to that as an abstract proposition. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title those two things must concur, damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Now, here Mr. Cosens may have sustained damage, but the commissioners have done no wrong. The dictum of Mr. Justice Wilmot was cited to show that where there is a right this Court ought to find a remedy. But the right that Mr. Cosens and each land-owner has, is to protect himself; not to be protected by his neighbors. To that right no injury has been done, nor can any wrongful act be charged against the commissioners. The Court, therefore, have no grounds for granting the mandamus applied for.

HOLROYD and LITLEDALE, Js., concurred.

Rule discharged.

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The KING v. GREET. — p. 363.

Information for usurping the office of jurat of the borough of Q. Plea, that the borough of Q. was a free borough, and that the burgesses of the borough were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough, and that by charter it was granted that the mayor, bailiffs, and burgesses, by whatever name they had before been incorporated, should thereafter be a body corporate by the name of "mayor, jurats, bailiffs, and burgesses;" that there should be one of the more honest and discreet burgesses or inhabitants called "mayor," to be elected as therein mentioned; and four honest and discreet burgesses or inhabitants called "jurats;" and two other honest and discreet burgesses or inhabitants called "bailiffs;" that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and whenever it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them, (of whom the mayor should be one,) within convenient time, to nominate another or others of the burgesses or inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs, of the borough

The plea then stated a vacancy in the office of jurat, and that the defendant, being an inhabitant of the borough, was duly elected to be a jurat. Replication, first, putting in issue the due election of the defendant; and secondly, that, from the time of granting the charter hitherto, it had been used and accustomed within the borough, that every inhabitant of the borough elected to be a jurat, before he took upon himself the office of jurat, should be sworn and admitted a free burgess of the borough, and that the defendant, before he took upon himself the office of jurat, had not been admitted and sworn a burgess. Demurrer. Upon the trial of the issues, in fact, it appeared that, at the election of the defendant, there were present the mayor, two bailiffs, and two jurats: Held, that the election was valid, for the general rule, that a majority of each definite part of the elective body should be present at the election, could not apply to this corporation, because, in the event of the death or removal of one of the bailiffs, it would be impossible that at the election of a new bailiff there should be present a majority of the bailiffs.

Held, upon demurrer to the replication, that according to the true construction of the charter, it was competent to the corporation to elect the jurats from the inhabitants of the borough or from the burgesses, and, therefore, that the plea was good, inasmuch as it showed that the defendant was an inhabitant of the borough at the time he was elected to the office of jurat.

Quo warranto information for usurping the office of jurat of Queenborough. Plea (admitting Queenborough to be an ancient borough) that the said borough from the 10th of May in the forty-second year of the reign of Lord Edward the Third, formerly king of England, until the granting of the charter next thereafter mentioned, was a free borough, and that the burgesses of the said borough during all that time were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough of Queenborough, &c., and that by charter 2 Car. 1 (the governing charter of the borough), it was granted that the mayor, bailiffs, and burgesses by whatever name they had before been incorporated, should thereafter be a body corporate, by the name of mayor, jurats, bailiffs, and burgesses; that there should be one of the more honest and discreet burgesses or inhabitants called mayor, to be elected as therein mentioned, and four honest and discreet burgesses or inhabitants called jurats, and two other honest and discreet burgesses or inhabitants called bailiffs. That the jurats and bailiffs should hold their offices for life unless removed for reasonable cause, and whenever it should happen that either or any of the jurats or bailiffs for the time being should die or be removed, or withdraw from his or their office or offices, it should be lawful for the mayor and other the surviving and remaining jurats and bailiffs for the time being, or the greater part of them (of whom the mayor should be one), within convenient time, to nominate, elect, and appoint another or others of the burgesses or inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs of the borough, and that he or they so elected, having taken an oath of fidelity to the king and faithfully to behave in all things touching the borough, should be able to execute the said offices according to their election respectively for their natural lives. Averment, that on, &c., there was a vacancy in the office of jurat, and the then mayor and the greater part of the jurats and bailiffs having duly assembled within the borough for the purpose of nominating, electing, and appointing a jurat to fill up the said vacancy, did then and there nominate, elect, and appoint defendant, being then and there an inhabitant of the said borough, to be a jurat of the said borough to supply the said vacancy; that he took the oaths, &c., and then took upon himself the office. There were several replications putting in issue the due election of the defendant, and concluding to the country. The seventh replication stated, that from the time of granting the charter of 2 Car. 1, hitherto it had been used and accustomed within the borough that every inhabitant of the borough elected to the office of jurat of the borough, before

he took upon himself the office of jurat, should be sworn and admitted a burgess of the borough, and that defendant before he took upon himself the office of jurat of the borough, had not been duly admitted and sworn a burgess. The eighth replication stated, that defendant at the time of his supposed nomination, election, and appointment to be a jurat was not a burgess of the borough duly sworn and admitted. To these replications the defendant demurred. The issues in fact were tried before *Park, J.*, at the Summer assizes for Kent, 1827, when it appeared that at the assembly at which the defendant was elected, there were present the mayor, two jurats, and two bailiffs, and that they all voted for him. Upon this evidence the learned Judge directed a verdict to be entered for the defendant, and gave the relator's counsel leave to move to enter a verdict for the crown. In Michaelmas term a rule nisi for that purpose was granted, and on a former day in this term

*Gurney, Bolland, and Tomlinson* showed cause. It cannot now be disputed that in general where by the provisions of a charter an election is to be made by an assembly composed of several definite bodies for the time being, "or the major part of them," a good elective assembly cannot be had without the presence of a majority of the entire number of each of those definite bodies, and that a majority of the existing number will not suffice. But the question here is, Whether that rule can be applied to the charter of the borough of Queenborough. It appears that there are a mayor, four jurats, and two bailiffs, and that vacancies in the offices of jurats and bailiffs are to be filled up by the mayor and the remaining jurats and bailiffs, or the greater part of them. Now the rule is manifestly inapplicable to this charter, for if one bailiff were to die, it would be impossible to fill up the office, for the surviving bailiff could not be considered as a majority of the two. So, also, if one bailiff misconducted himself, and it were thought proper to remove him, a legal assembly for that purpose could not be held unless he consented to be present. Again, if two vacancies in the offices of jurats should occur, which is not a very remote probability, they could never be filled up for want of the attendance of a majority of the entire number of jurats. These difficulties show that the rule of construction adopted in other cases is inapplicable to this, and that a majority of the aggregate number of the three component parts of the elective assembly, mayor, jurats, and bailiffs is sufficient to make it a good assembly, although the majority of each integral part be not present. If so the defendant was well elected by an assembly where the mayor, two jurats, and two bailiffs attended and voted.

*Merewether, Serjt., Adolphus, and Platt*, contra. The general principle having been admitted, the only question is, Whether it be applicable to the present case. The rule requiring the presence of a majority of each definite integral part of an elective assembly, has always been treated as of great importance to the well being of corporations, the Court, therefore, will not depart from it unless there are strong grounds for so doing. One or two instances have been pointed out in which it would be impossible to apply the rule to this corporation; those certainly must be considered as exceptions, for *lex neminem cogit ad vana aut impossibilia*. But the exception should not be carried further than the necessity of the case requires, more especially where the entire elective assembly can never exceed six in number, for it is obvious that in such a case the charter should be so construed as to compel as large an attendance out of that number as possible. In the present case it appears that there

were three existing jurats, a majority of the whole number four might therefore have attended, and for want of such attendance the election of the defendant was invalid. If it is sufficient to have a majority of the entire body of mayor, jurats, and bailiffs present, an elective assembly may be held without the presence of either of the bailiffs.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

LORD TENTERDEN, C. J. This was a motion to enter a verdict against the defendant upon an information in the nature of a quo warranto, for usurping the office of a jurat of the borough of Queenborough. By the constitution of that borough there are a mayor, four jurats, and two bailiffs, seven persons in all, and those integral parts compose the assembly by which jurats are to be elected. At the election of the defendant there were present the mayor, two jurats, and two bailiffs, constituting a majority of the seven, but it was objected, that there could not be a good elective assembly, without the presence of three jurats, so as to make a majority of that body. The objection was founded on several decided cases, but they will not be in any way affected by the judgment about to be pronounced. The language of this charter is in substance the same as of several others upon which the decisions alluded to have proceeded. It is "that whensoever it shall happen that either, or any, of the jurats or bailiffs of the borough for the time being, shall die or be removed, or withdraw from his or their office or offices, then and so often it shall be lawful for the mayor, and other the surviving and remaining jurats and bailiffs of the borough for the time being, or the greater part of them (of whom the mayor shall be one), within a convenient time, to nominate, elect, and appoint another, or others, of the burgesses or inhabitants of the borough for the time being, to be a jurat or jurats, bailiff or bailiffs." I have observed that this in substance very strongly resembles the language of other charters in which it has been held that the expression "the greater part of them" shall be referred to the former member of the sentence, enumerating the component parts of the corporation; as for instance, mayor, aldermen, and capital burgesses, and not to the latter part of the sentence, where "the remaining and surviving" members of those definite bodies are spoken of. And this has been carried still further, for it has been decided that it will not suffice to have a majority of the aggregate number of mayor, aldermen and capital burgesses, but that a good corporate assembly cannot be held, unless there be present a majority of each component definite part of it; and upon these decisions it was contended that the election of the defendant was invalid, inasmuch as a majority of the entire number, four jurats, were not present. But in each of the cases to which I have alluded the judgment of the Court was founded on a rule of construction not strictly required by grammatical rules, for the expression "or the major part of them" might, in each of those cases, have been referred to the latter branch of the sentence, as well as the former. Perhaps, indeed, it would grammatically have been more correct to refer it to the last antecedent than to that which was more remote. But the rule was founded upon a sound and wise principle, viz., that the select body in a corporation should be compelled to fill up vacancies in its component parts as they occur, and the most convenient and certain mode of doing that, is to require at elections the presence of a majority of each of

those parts. It is by no means our intention to break in upon or weaken the authority of those decisions; but if we are called upon to construe a charter to which that rule cannot be applied, without leading to an absurdity or an impossibility, as it would in this case, it is manifest that, in order to give effect to the charter, some other construction must be given to it. In the borough of Queenborough, if a bailiff were to die, or be removed, or withdraw, upon the construction contended for, his place could never be supplied. If two vacancies should at one time occur in the office of jurats, the same consequence would follow. But it is said that as a majority of the jurats were in this instance remaining, they ought to have attended. To require that in the one case and not in the other, would be putting two different constructions on the very same words, which we ought not to do. It seems to me that we ought to adopt such a construction as will give effect to the charter, and at the same time be uniform and consistent, and that such a construction will be given by holding that the election of the defendant made by the mayor, two jurats, and two bailiffs, constituting a majority of the entire number of mayor, jurats, and bailiffs, was valid. The rule for entering a verdict for the crown must therefore be discharged.

#### Rule discharged.

The demurrer to the replication stood in the paper for argument at the sittings in banc after Michaelmas term, and upon the statement of the pleadings, the Court intimated an opinion that the question, whether the usage stated in the replication could be pleaded in explanation of the charter, (a) was not properly raised on these pleadings, inasmuch as the charter was not set out in *hæc verba*, but the legal effect of it only. Leave was granted to the prosecutor to amend; but *Platt*, for the prosecutor, afterwards said, that he would not amend, and if he could not support the replication, would contend that the plea was bad.

*Tomlinson* in support of the demurrer. By the charter as pleaded, *burgesses or inhabitants* are eligible to the office of jurat. The plea states that the defendant was an inhabitant, and was elected. If the charter specifies *burgesses and inhabitants* as two distinct classes of persons, the defendant satisfies the charter by showing that he belonged to one of those classes; if it uses the words *burgesses or inhabitants* as synonymous, then the defendant has brought himself within the charter by showing that he is an inhabitant, the charter having declared that any person being an inhabitant or a burgess, shall be eligible to serve the office of jurat, and that being stated to be the legal effect of the charter in the plea. The replication is, that by usage no person is eligible to serve the office, unless he unite the two characters of burgess and inhabitant. It, therefore, sets up an usage to contradict or explain the charter, which in itself is free from ambiguity. *Rex v. Miller*, 6 T. R. 268, shows that the replication is bad. (He was then stopped by the Court.)

*Platt*, contra. Although the charter is not set out in the pleadings in *hæc verba*, that which is set out as the legal effect of it, shows sufficiently that in order to make a party eligible to the office of jurat, he ought to be a free burgess. Grants from the crown must be construed strictly, *Comyn's Dig.*, Grant, 12. But they must also receive a reasonable con-

(a) See as to this point 2 Inst. 282; *Shepherd v. Gosnold*, Vaugh. Rep. 169, 170; *Rex v. Varlo*, Cowp. 250; *Cape v. Handley*, 3 T. R. 288; *Rex v. Bellringer*, 4 T. R. 810; *Rex v. Miller*, 6 T. R. 268; *Rex v. Hoyte*, 6 T. R. 430; *Rex v. Osbourne*, 4 East, 333.

struction, *Webb's case*, 8 Rep. 90. In *James v. Tallent*, 5 B. & A. 889, the declaration was upon a bond conditioned to pay to a woman yearly, during the joint natural lives of herself and two children, a certain sum, therein mentioned, the annuity to be applied to the maintenance and education of the children, as well as of herself; or in case of the death of the two children therein specifically named, then the same annuity was to be payable to her during her life: one of the children died during the life time of the mother; it was held upon demurrer to the declaration that the annuity was payable to her during her life at all events. In that case, although the bond was not set out in *hæc verba*, the Court collected the intention to be different from that which the words taken in their literal sense, would import, for by the terms of the condition taken literally, the annuity was to be payable only during the joint lives of the woman and her two children, but the Court held it to be payable to the woman after the death of one of the children. So in this case, although the charter be not set out in *hæc verba*, it sufficiently appears from the legal effect of it set out in the plea, that a person eligible to the office of jurat must be a burgess and an inhabitant. Comyn's Dig., Parol, A 11, shows that the word "*or*" may be construed *and* when the intent requires it. The plea states that at the time of granting the charter, the borough was an ancient borough, and that it had consisted of *burgesses* only. It further states that the *burgesses* of the borough were a body corporate. The grant is, that the mayor, bailiffs, and *burgesses* shall be incorporated. The jurats at that time did not exist. The inhabitants were not at that time part of the corporate body, and if that be so, there is nothing stated in the charter to make the inhabitants any part of the body corporate afterwards. [BAYLEY, J. In *Rex v. Downes*, 5 B. & C. 182, the charter incorporated the men free burgesses of the borough of Colchester, and declared that for ever thereafter there should be within the borough to be chosen out of the free burgesses eighteen common councilmen, and then nominated eighteen persons to be common councilmen, and it was held that the charter virtually made them free burgesses also. That shows that if the king in this case had named an inhabitant to be a jurat, he would ipso facto be a burgess, and if the king can in a place where there has been a corporation before, grant that an inhabitant shall be a common councilman, surely he may authorize the corporation he so creates, to select future common councilmen from the inhabitants.] In *Rex v. Tate*, 4 East, 337, the king, by charter, incorporated the inhabitants of the borough by the name of the mayor, bailiffs, and burgesses. The defendant, an inhabitant, claimed as a matter of right to be sworn in as a free burgess. The mayor refused to swear him in, but the recorder administered the oath to him. The Court held that the taking of the oath whereby the party claimed at the time to be a free burgess was a sufficient user of the office, and granted an information against him for usurping the office of free burgess. The Court, therefore, must have been of opinion that inhabitants had no right to be admitted free burgesses. In *Rex v. West Loo*, 3 B. & C. 677, (a) the Court held that an inchoate right of admission was not given to inhabitants by a grant that the borough should be a free borough corporate of one mayor and burgesses, being inhabitants of the town.

BAYLEY, J. The legal effect of this charter, as it is pleaded, is, that

(a) See *Rex v. Hereford*, 11 Mod. 188

on the removal of a bailiff or jurat, either the one or the other of two descriptions of persons, viz., burgesses or inhabitants, should be eligible to fill the office of bailiff or jurat. The plea shows that an inhabitant has been elected.

LITLEDALE, J. This is a very clear case. The word inhabitant is first used in the clause relating to the election of mayor. It provides that there shall be one of the more honest and discreet burgesses or inhabitants of the borough to be elected mayor. There then follow clauses which provide for the election of jurats, and of bailiffs, from the *burgesses or inhabitants*. Those words import that the jurats and bailiffs may be taken either from burgesses or inhabitants. It is insisted that the word *or* must be read *and*, and, consequently, that jurats are to be chosen out of the burgesses *and* inhabitants. If those words are synonymous, it was sufficient for the defendant to state in the plea that he was an inhabitant, for that implies burgess. But if they are not, still it appears to me that the construction contended for in support of the replication ought not to prevail; for if the intention of the crown had been that the jurats should be elected from persons being inhabitants and burgesses, the charter would have described them as burgesses inhabiting within the borough, or burgesses who were inhabitants. It is clear that it was intended that the jurats should be selected either from burgesses or from inhabitants. Such a provision is not unreasonable, nor is there anything in the charter to show that it was intended that the two characters of burgess and inhabitant should be united in a person eligible to the office of jurat. The mayor may be elected out of the burgesses or inhabitants; so may the bailiffs and jurats. I see no reason why the crown should not give a power to the principal officers of the corporation to elect to the office of jurat an inhabitant who has not passed through the inferior office of burgess. A man may make as good a jurat without being a burgess first as if he had been one.

PARKE, J. The replication is bad for the reason already stated. Then, as to the plea, it is perfectly clear that either burgesses or inhabitants may be elected jurats at once. There is nothing unreasonable in this provision, nor in the slightest degree inconsistent with other parts of the charter. We must hold, therefore, that the defendant, who was an inhabitant, was eligible at once to the superior office of jurat without passing through the inferior office of a burgess. The judgment of the Court must, therefore, be for the defendant. Judgment for defendant.

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The KING v. The Justices of the County of BUCKINGHAM. — p. 375.

An indictment had been preferred against a county for not repairing a bridge, at the instance of the inhabitants of a parish, and the question intended to be tried was, Whether the inhabitants of the parish or of the county were liable to repair it. The Court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the repair of the bridge.

A RULE nisi had been obtained for liberty for the defendants to inspect, and take extracts from, the books, papers, minutes, and proceedings of the prosecutors, as bridge-wardens and trustees of Marlow Bridge, and all other documents of them the bridge-wardens relating to the said bridge. This rule was founded on an affidavit of the clerk of the peace for the county of Buckingham, which stated the following facts: In

Trinity term an information against the defendants, for not repairing Great Marlow Bridge, was obtained at the instance of the bridge-wardens and trustees of certain lands in the parish of Great Marlow, the annual rents whereof were applicable to the repairing of Marlow Bridge; and in order to make a good defence to the information, it was necessary to inspect the books of account, and of minutes of the proceedings of the bridge-wardens; and also to inspect all other papers and documents touching or concerning the receipt of the rents, and the management of the estates held by them the bridge-wardens for the purposes aforesaid; and also the accounts of the disbursements of such rents. The clerk of the peace had made application to the bridge-wardens' solicitor for inspection, but permission to inspect was refused. He found, in his office of clerk of the peace, among the records of the county, a statement of a case, with the opinion of counsel thereon, which statement appeared to have been made with the consent of the bridge-wardens, inasmuch as it contained copious extracts from their book, called the Bridge Book; and from such statement it also appeared that the said bridge-wardens and trustees had been from time to time elected by, and their accounts submitted to, and allowed by, the inhabitants of Great Marlow in vestry assembled.

*Gurney* and *Bayly* showed cause. The books and documents mentioned in the rule, are the private books of the bridge-wardens, kept for their own use or for that of the inhabitants of the parish of Great Marlow. The inhabitants of the county have no interest in them, and have no right, therefore, to inspect them; *The Mayor of Southampton v. Graves*, 8 T. R. 590; *Cox v. Copping*, *Ld. Raym.* 387. Besides, inspection of the defendant's documents, at the instance of a prosecutor in a criminal case, is never granted, because a defendant is never bound to produce evidence against himself, *The Queen v. Mead*, *Ld. Raym.* 927. Now here the object of the application is to compel the inhabitants of the parish of Great Marlow to produce documents which may be given in evidence in favour of the defendants in this case, but which may be used against the inhabitants of Marlow on any indictment which may hereafter be found against them for not repairing the bridge. The question is, whether the inhabitants of the county or the parish be liable to repair. The case must be considered as if there were two indictments; one against the county, the other against the parish. In *Rex v. Holland*, 4 T. R. 691, which was an information against the defendant founded upon the report of a board of inquiry in India, the defendant applied for a rule to inspect the report, but it was refused.

*Maltby*, contra. In *Harrison v. Williams*, 3 B. & C. 162, which was an action against the defendant for the breach of a byelaw, restraining persons from exercising trades within the limits of a corporate city unless they became freemen, the Court compelled the corporation to allow the defendant to inspect their books although he was not a member of the corporation, but a mere resident within the city. The bridge-wardens may be considered trustees for the public, who are entitled to use the bridge, and have an interest that it should be repaired; and the inhabitants of the county are directly interested, because they are *primâ facie* bound to repair it. Now *Pickering v. Noyes*, 1 B. & C. 262, shows that trustees for others, or for others jointly with themselves, are compellable to allow inspection of their books. But the books in question are not of a private nature; they are open to the inspection of all the parishioners in vestry. In *Allan v. Tap*, 2 Blac. Rep. 850, the rule to inspect books was refused, because the question concerned a private right, but here a



public right is concerned. In an action against a sworn broker of the city of London for negligence in making a contract, the Court compelled him to produce his books, on the ground that he was a public agent, *Browning v. Aylwin*, 7 B. & C. 204. It is true that the Court will not, in a criminal prosecution, compel the party accused to produce evidence against himself, but the inhabitants of the parish of Great Marlow are not indicted. The application in this case is made not on behalf of the prosecutor, but on the behalf of the party accused. Besides, although the proceeding be criminal in point of form, it concerns a civil right, and it is the only remedy provided by the law for the breach of such a right.

LORD TENTERDEN, C. J. The question at the trial of the information in this case will be, Whether the inhabitants of the county or the inhabitants of the parish of Great Marlow are liable to repair the bridge. The defendants will say that the inhabitants of the parish are liable. The question, therefore, will be the same as if the inhabitants of the parish had been indicted. Now, it is clearly established by the authorities that if the application were made on behalf of the prosecutor in an indictment against the parish to inspect the books of the latter, the Court would not compel the latter to furnish evidence to make a case against themselves; and as the effect of granting the application in a case like the present may be to compel the parish to furnish evidence which may hereafter be used against them on an indictment preferred against them, I think we ought not (considering this as a contest between the county and the parish) to compel the parish to produce the documents in question; and if we ought not to compel the inhabitants of the parish to produce these documents, ought we to compel the bridge-wardens, who are trustees for the parish? It has been said that it may be a question whether the bridge-wardens are trustees for the county or for the parish. Upon the affidavits there is every reason to suppose that they are trustees for the parish. They are identified with the parish. They are elected by, and their accounts are submitted to, the parishioners in vestry assembled. As we could not compel the parish to produce evidence against themselves, I think we ought not to compel the bridge-wardens to do so, they appearing to be trustees for the parish.

BAYLEY, J. In order to entitle a party to inspect books, they must either be public books, or the party who applies for such inspection must have an interest in them. In the case of corporation books, no person wholly unconnected with the corporation has a right to inspect them. This is a public prosecution, and the application is made on behalf of the defendants. If all the subjects of the realm have an interest in the books and documents, the application ought to be granted. But these books are kept not for the benefit of all the subjects of the realm, or even of the inhabitants of the county of Buckingham, but for the benefit and on the behalf of the inhabitants of the parish of Great Marlow. They are, properly speaking, not public but parochial books. This, therefore, is an application by one litigant party to compel the other to produce his own private books to make out a case against him. This is indeed a proceeding against those who apply for the inspection, but if they obtain inspection of the parish books, they may hereafter institute a criminal proceeding against the parish of Great Marlow, and use the extracts from their own private books as evidence against them.

HOLROYD and LITLEDALE, Js., concurred.

Rule discharged.

## The KING v. The Justices of WILTS. — p. 380.

The 17 G. 2, c. 38, s. 4, does not make it imperative on the justices to hear and determine an appeal at the sessions next following the publication of the rate, but they may adjourn it to the next sessions. Where a rate was published on the 16th September, and the appeal was entered at the Michaelmas sessions, but the defendant did not give notice of his intention to try his appeal at those sessions, and the justices adjourned it as a matter of course to the Epiphany sessions, according to the usual practice, and the appellant gave notice of his intention to try his appeal at the Epiphany sessions, when the justices refused to hear it, on the ground that it ought to have been heard and determined at the preceding sessions, this Court granted a mandamus to compel them to hear the appeal.

A RATE for the relief of the poor of the parish of Laycock, in the county of Wilts, was published on the 16th September, 1827. The quarter sessions were held on the 16th October, at Marlborough, which is sixteen miles from the parish of Laycock. The appellant gave no notice of his intention to try his appeal before the Michaelmas sessions, but at that sessions the appeal was entered and adjourned as a matter of course. It appeared upon affidavits that it was the usual practice for the court of quarter sessions for the county of Wilts, in appeals against rates, to enter the appeal at the sessions next following the making and publication of the rate, and to adjourn it to the next sessions as a matter of course. Before the Epiphany sessions the appellant gave notice of his intention to try his appeal. At the Epiphany sessions the respondents put in the rate made on the 16th September, and then objected that the appeal not having been heard at the previous Michaelmas sessions, nor having been adjourned on proof of want of reasonable notice to the respondents, or of its being impracticable for the appellant to proceed, the justices then assembled had no jurisdiction. The justices at sessions were of that opinion, and refused to hear the appeal. A rule nisi for a mandamus commanding the defendants to enter continuances to the next sessions, and hear the appeal, having been obtained,

*Bingham* now showed cause. An appeal against a poor-rate might, under the 43 Eliz. c. 2, s. 6, have been made to any sessions subsequent to the publication of it. The statute 17 G. 2, c. 38, s. 4, was passed to remedy that inconvenience. By that statute it is enacted, "that it shall be lawful for any persons finding themselves aggrieved by any rate made for the relief of the poor, upon giving reasonable notice to the churchwardens and overseers of the poor of the parish, &c., to appeal to the next general quarter sessions of the peace for the county, riding, division, corporation, or franchise where such parish, &c., lies; and the justices of the peace there assembled are hereby authorised and required to receive such appeal, and to hear and finally determine the same, but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same." First, where it is practicable to appeal to the next sessions, it is imperative on the party to appeal to the next sessions. The intention of the legislature was clearly to confine the appeal to the next sessions, meaning by the next sessions, the next practicable sessions at which an appeal might be lodged, *Rex v. The Justices of Worcestershire*, 5 M. & S. 457, *Rex v. The Justices of Dorsetshire*, 15 East, 200. Secondly, where it is practicable to give notice, it is imperative on the parties to do so before the next sessions. The act confines the appellant to the next sessions to which it is practicable for him to give notice, and does not give him an option of appealing to the next sessions

but one. But as he is only entitled to appeal to the next sessions, upon giving reasonable notice, it must be imperative on him to do so where it is practicable, otherwise, instead of being confined in such a case to an appeal to the next sessions, he might, by abstaining from giving notice, or by giving an unreasonably short notice, obtain by his own wrong, a power of appealing to the next sessions but one, and thus defeat the intention of the statute to confine it to the next session. Thirdly, if he give reasonable notice for the next sessions, the justices *there* assembled, and those justices only, have jurisdiction to hear and determine the appeal. The justices at the ensuing sessions are generally a different set of persons. The anxiety of the legislature that the appeal against a rate should be determined at the sessions when it is entered, gives the true construction to the words "upon giving reasonable notice." It would be useless to command an appeal to the next sessions, and a decision at those sessions, if it were not imperative on the party appealing to give reasonable notice when practicable. The object of the legislature evidently was to prevent the confusion and inconvenience which would result from a parish being without a rate for more than three months, or from a rate being set aside at the end of six months. This anxiety is also shown by the legislature not allowing an adjournment in every case, but only in the event of its appearing that reasonable notice was not given. The same anxiety is not shown in the acts giving appeal against orders of removal, nor is there the same reason for a speedy decision, the costs of maintenance being easily computed. The statute 13 & 14 Car. 2, c. 12, s. 2, requires the sessions to do justice according to the merits of the cause. Here the facts show beyond doubt that it was practicable for the appellant to have given notice for the Michaelmas sessions. The appellant ought to have shown that it was impracticable for him to give notice in order to raise a jurisdiction in the sessions to adjourn. *Rex v. The Justices of Shropshire*, 7 East, 549, and *Rex v. The Justices of Wilts*, 10 East, 405, may be relied upon by the other side; but those were cases of appeals against orders of removal, and do not apply.

*Scarlett and Wyburn*, contra. The 9 G. 1, c. 7, s. 8, enables the justices upon appeals against orders of removal to adjourn. The words are, "that if it shall appear to them that reasonable notice was not given, then they shall adjourn the appeal to the next quarter sessions, and then and there finally determine the same." Now it has been decided, that though that statute is imperative upon the justices to adjourn the appeal only where reasonable notice has not been given, it leaves to them a discretion to adjourn in other cases: *Rex v. The Justices of Shropshire*, 7 East, 549; *Rex v. The Justices of Buckinghamshire*, 3 East, 342; and *Rex v. The Justices of Wilts*, 10 East, 405.

Lord TENTERDEN, C. J. I think that the sound construction of the act of parliament is that the justices are to receive an appeal against a rate at the next sessions after publishing the same, and that they are then to exercise a discretion whether they will hear and determine it at that sessions, or respite it to the next. It is impossible to say that the matter must at all events be determined at the first sessions. The statute expressly mentions one case where the justices are to adjourn the appeal, and that is where it shall appear to them that reasonable notice has not been given; but other cases may occur in which it may be fit to adjourn the appeal, even though reasonable notice has been given, as in the case of the unavoidable absence of a material witness. Here it appears that the practice of the sessions has been to allow appellants to enter their

appeals at the sessions next following the publication of the rate, and to adjourn the hearing to the second sessions as a matter of course. That being the general practice, I think that the appellant in this case, who acted on the faith that such practice would be adhered to, ought not to be deprived of his right of appeal, and therefore that the rule for a mandamus ought to be made absolute. At the same time I think it would be more beneficial to the public, and more consistent with the intention of the legislature, if the justices did not adjourn appeals against rates as a matter of course. I think they should endeavour to induce parties to try their appeal at the next practicable sessions after the publishing of the rate.

BAYLEY, J. I am of the same opinion. It was competent for the justices at the first sessions after the publishing of the rate, to refuse to receive the appeal unless there was proof that notice of appeal had been given; but they did receive the appeal. Having received it, it was then competent to them in their discretion to adjourn it, and they did adjourn it. I think the appeal ought to have been heard at the next sessions after that adjournment.

Rule absolute.

### HAYWARD and Others v. WRIGHT.—p. 386.

Where a cause has been sent back by procedendo to an inferior court, this Court will not quash the writ on the ground that the cause is important, and fit to be tried in the superior court.

THIS was an action commenced in the Palace Court, and removed into this Court by habeas corpus. The defendant did not justify bail in due time, and a procedendo issued.

*Parke* afterwards obtained a rule nisi for quashing the procedendo, on an affidavit stating that the cause was of importance, and fit to be tried in this Court.

*Thesiger* showed cause, and relied on the stat. 21 Jac. 1, c. 28, s. 3, which enacted that no cause should be again removed which had been once sent back by procedendo to an inferior court.

LORD TENTERDEN, C. J. We cannot make this rule absolute. There is a regular fixed course by which a party may remove his cause from an inferior court. The defendant in this instance neglected to do that which the statute requires, and so lost the benefit of that course. He now seeks to remove the cause on the ground that the nature of the question to be discussed makes it more fit to be tried here than in the inferior Court. It would be novel and dangerous to listen to such an application: many similar attempts would soon be made, and this Court would constantly be invited to inquire into the merits of the case by affidavit. The rule must be discharged.

Rule discharged.

### FIRTH v. THRUSH. — p. 387.

The indorsee of a bill of exchange, dishonored by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to him and the other prior indorsers; the attorney, after inquiry, having received information of this indorser's place of residence on the following day, consulted his client, and on the third day sent notice of the dishonor of the bill: Held, that the notice was sufficient.

The declaration averred that the defendant had notice of the dishonor: Held, that allegation was satisfied by proof, that he had notice as soon as it could reasonably be given, and that it was unnecessary, therefore, to state in the declaration the special circumstances which rendered valid the notice given at a later period than in ordinary cases would be sufficient.

*Brougham and Chitty, contra, cited Cory v. Scott, 3 B. & A. 619.*

LORD TENTERDEN, C. J. I cannot entertain any doubt that the allegation in the declaration, that the defendant had notice of the dishonor of the bill, was fully proved, by showing that he had a notice good and available in law. It was quite unnecessary to state on the record the special circumstances or facts which rendered the notice valid, although it was given at a latter period than would in ordinary cases have sufficed. Then all difficulty as to the form of the declaration being removed, the only remaining question is, Whether the notice of dishonor was good and valid. It struck me at the trial, that as Major was the agent of the defendant for the purpose of indorsing the bill, he was also his agent for the purpose of receiving notice of dishonor, and that notice having been given to him in due time, that was notice to the defendant. I still incline to be of that opinion. But it is unnecessary to decide the case upon that ground. I would rather decide it on more general principles. For a month or more there was no knowledge of the defendant's abode. It was clear that the holder of the bill was not guilty of any laches before the 24th of September. He had made inquiries of Major and of his attorney as to the defendant's residence, and they would not give him any information. The plaintiff sent notice of dishonor to Frome, which was the place where the bill purported to have been drawn. That letter was returned to Pownall on the 24th of September, and he thereupon wrote to an attorney at Poole, and requested him to ascertain the place of residence of the defendant. On the 16th of October he received information of the defendant's residence. If he had written to the defendant on the 17th, there would not have been any doubt that the notice would have been sufficient; but he did not write till the 18th; the question is, Whether he was entitled to take a day to consult his client. Pownall was not the holder; he was the agent and attorney of the plaintiff, employed by the latter to give notice of the dishonor. If Pownall, the agent of the plaintiff for the purpose of giving notice of dishonor, had a right to take a day to consult his client under the special circumstances of the case, the notice was sufficient. I think he had. If the letter had been sent to the principal, he would have been bound to give notice on the next day; but it having been sent to the agent, he was not bound to give notice on the following day. A banker who holds a bill for a customer, is not bound to give notice of dishonor on the day on which the bill is dishonored. He has another day; and upon the same principle I think the attorney in this case was entitled by law to be allowed a day to consult his client. This rule must, therefore, be discharged.

BAYLEY, J. I am of the same opinion. The allegation that the defendant had notice was proved by showing that he had notice as soon as it could reasonably be given. The duty of the holder of a bill is to use due diligence to discover the residence of parties entitled to notice. Here the holder attempted, before the bill became due, to ascertain from the drawer the place of the defendant's residence, and the drawer would not give the information. It was unnecessary when the bill became due to renew the same attempt, and the plaintiff sent notice to the place where he might reasonably suppose the defendant to reside. On the 16th of October Pownall received notice that the defendant resided at Burton. Pownall was entitled to go to his client and consult him. He has one day for that purpose, and goes on the 17th of October. Pownall had the

same period of time as the party himself. There is a class of cases analogous to this; I mean those cases where bills are deposited in the hands of a banker for the benefit of a customer. The banker has a day to give notice to his customer. If the holder of a bill place it in the hands of his banker, the latter is only bound to give notice of its dishonor to his customer in like manner as if he were himself the holder, and his customer must send to the party next entitled to notice; and the customer has the like time to communicate such notice as if he had received it from a holder. (a)

HOLROYD, J. The law requires reasonable notice. The facts proved in this case show that reasonable notice was given. This is exactly like the case of a bill deposited by a customer with his banker. If the bill in question had been deposited by the plaintiff with his banker, and dishonored on the 16th, it would have been sufficient for the banker to have given the plaintiff notice on the 17th, and for the plaintiff to have given notice to the defendant on the 18th. I am, therefore, of opinion that the notice given in this case was sufficient. I think also that the form of declaration is proper, and that the allegation that the defendant had notice, was satisfied by proof that he had that reasonable notice which the law requires.

LITLEDALE, J. I think that the notice was sufficient, for the reasons already given by the rest of the Court. I also think that the averment in the declaration was proved. In *Bateman v. Joseph*, 2 Camp. 461, 12 East, 433, which was an action by the indorsee against the payee and first indorser of a bill of exchange, it appeared that the plaintiff received notice of the dishonor on the 30th of September, in time to have given notice on that day; he gave no notice till the 4th of October, but his clerk proved that he did not know the defendant's residence till that day. Lord *Ellenborough* there said, "The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonor of the bill within the usage and custom of merchants." And he left it to the jury to find for the plaintiff if they thought he had used due diligence to discover the residence of the indorser. In this case there can be no doubt that due diligence was used in that respect. If the notice, under the peculiar circumstances of the case, was a valid notice at the time it was given, the allegation is satisfied by the proof. I do not recollect to have ever seen the special circumstances which excuse the want of notice at the time when it is usually required, stated in a declaration.

The legal effect of such special circumstances is to make a notice on the 18th of October a good and valid notice. It is sufficient in pleading to state the legal effect. The rule for entering a nonsuit must, therefore, be discharged.

Rule discharged(b).

(a) See *Haynes v. Birks*, 3 Bos. & Pul. 599, *Scott v. Lifford*, 9 East, 347, *Langdale v. Trimmer*, 15 East, 291.

(b) See *Baldwin v. Richardson*, 1 B. & C. 245.

## FAIRLIE v. DENTON and BARKER. — p. 395.

The general rule of law is, that a debt cannot be assigned. The exception to that rule is, that where there is a defined and ascertained debt due from A. to B., and a debt to the same or a larger amount due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B., the latter may maintain an action against C. But in such action, it is incumbent on the plaintiff to show, that at the time when C. promised to pay B. there was an ascertained debt due from A. to B.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial, before Lord *Tenterden*, C. J., at the London sittings after Hilary term, 1828, the following appeared to be the facts of the case. By articles of agreement, the defendants and one E. Perry agreed to grant a piece of land, therein described, unto S. Crossland and J. Stonehouse, who agreed to build on the same land twelve brick messuages or dwelling-houses. The defendants and Perry agreed to purchase from Crossland and Stonehouse a yearly rent charge of 96*l.*, to be charged upon the said messuages, at and for the sum of 1200*l.*, which said sum of 1200*l.* was to be paid to Crossland and Stonehouse, or to their order in writing, by six instalments, at specified stages in the progress of the buildings. The 5th instalment was 180*l.*, and was to be paid as soon as the plasterers' work should be finished. The 6th and last instalment was 240*l.*, and was to become due when each of the twelve messuages should be painted, papered, and colored, iron rails and iron work fixed, and in all respects completely fit for the reception of a tenant.

The defendants from time to time made payments on account of the 1200*l.* to Crossland and Stonehouse, and the latter at different times gave to the plaintiff eight orders in writing on the defendants, for several sums of money, amounting in the aggregate to 499*l.* 10*s.* The defendants paid the sums mentioned in the first five orders only. Crossland, being called as a witness, stated, that he kept a book in which he entered all moneys received by him of the defendants, and he entered, as cash payments made by them, the amount of the several orders given by him and Stonehouse in favor of the plaintiff; and he further stated, that the defendants kept a book, in which there were entries corresponding in all respects with his own, the two accounts having been frequently checked and compared with each other. The defendants' book having been produced, it appeared that they had charged Crossland and Stonehouse, on account of the orders given to the plaintiff, with such sums only as they had actually paid the plaintiff. Crossland further stated, that after all these orders had been given, and the first five had been paid, he on the 5th of February applied to the defendants for a further advance. At that time the defendants had advanced to Crossland and Stonehouse, including the sums paid in pursuance of their orders to the plaintiff, 872*l.*, and the plaintiff had lodged in the defendants' hands orders of Crossland and Stonehouse to the amount of 233*l.* They refused to advance Crossland and Stonehouse any further sum, alleging as a reason for their refusal that there was upwards of 200*l.* due to the plaintiff on the orders lodged with them, for which they, the defendants, were responsible. The plaintiff gave no evidence to show that at the time when this conversation took place, the buildings were in such a state of forwardness

as to entitle Crossland and Stonehouse to a larger sum than that which had already been advanced to them by the defendants; and it afterwards appeared, in the course of the defendants' evidence, that the buildings were not only not completed on the 5th of February, but it was at least doubtful whether the plasterers' work had been done so as to entitle Crossland and Stonehouse to the fifth instalment. The defendants afterwards paid to Crossland and Stonehouse the further sum of 95*l.*, which, together with the sums paid by them, and the sum of 233*l.*, which the plaintiff claimed to be paid to them in pursuance of their orders, would make up the full sum of 1200*l.*, which was to become due to Crossland and Stonehouse when the buildings should be completed.

Upon these facts, it was contended, on the part of the defendants, that the plaintiff could not recover, because he claimed as assignee of a debt which by law could not be assigned. If by an agreement between the three parties, the plaintiff had undertaken to look to the defendants, and not to his original debtors, that would have been binding, and the plaintiff might have maintained an action on the agreement; but in order to give him that right of action, there ought to have been an extinguishment of the original debt, which would have been a good consideration for the defendants' promise. *Wharton v. Walker*, 4 B. & C. 163. Here the plaintiff never agreed to discharge or release the debt owing to him by Crossland and Stonehouse, and he may sue them at any time. Secondly, assuming that the original debt was extinguished, this action for money had and received is not maintainable, because the defendants never in fact received any money on account of the plaintiff. Lord *Tenterden* directed the jury to find a verdict for the plaintiff, if from the evidence they thought that the defendants had ever acknowledged that they held in their hands money for the plaintiff; but he reserved liberty to the defendants to move to enter a nonsuit, if the verdict should be against them. A verdict having been found for the plaintiff, a rule *nisi* for entering a nonsuit was obtained by Sir *James Scarlett* in last Easter term.

*F. Pollock* and *R. V. Richards* now showed cause. If the defendants agreed to consider the money due to Crossland and Stonehouse in respect of the building contract, as money had and received by them, the defendants, on account of the plaintiff, they are liable in this action. The legal effect of such an agreement would be the same as if they had handed over the money to the plaintiff, and he had returned it to them. In *Spratt v. Hobhouse and Others*, 4 Bingh. 173, Lynch, the lessee of a public-house, was indebted to the defendants 1275*l.* Temprell purchased the lease of the house from Lynch for 1690*l.* Temprell had in the hands of the defendants 690*l.*, and it was agreed between Temprell and the defendants that they should advance him 1040*l.* Temprell, Lynch, and the clerk of the defendants met together, and Temprell drew a check on the defendants in favour of Lynch for 1690*l.* The defendants' clerk received the check, and gave Lynch a draft on the defendants for 415*l.*, being the difference between 1690*l.* and 1275*l.* the sum due from Lynch to the defendants. Lynch had committed an act of bankruptcy before this transaction took place, and notice was given to the defendants not to pay the draft to Lynch; but they did so. *Spratt*, Lynch's assignee, sued for the amount as money had and received to his use, and *Best*, C. J., directed the jury to find for the plaintiff if they thought the transaction between Temprell and the defendants' clerk was equivalent to a passing of the money. The jury having found for the plaintiff, it was held, after argument on a rule



decided yesterday, in *Fairlie v. Denton*, that a debt cannot be assigned. It does not appear that any new arrangement was made by all the three parties. Suppose, however, the warrant of attorney was given to Tatlock alone, because the partnership was about to be dissolved, and he was to pay and receive all moneys on account of the concern, still it was to secure a partnership debt, and any payment on that security to him would be on account of both, and to the credit of both.

*Denman* and *Alderson*, contra. The plaintiffs in this action seek to charge the defendant with money improperly received by Tatlock, after they had dissolved partnership. He received it on a security given to himself alone, although for a debt originally due to both; and it does not appear that this was done by the authority or consent of the defendant. In *Kilgour v. Finlyson, and others*, 1 H. Bl. 155, it appeared that Finlyson, after having dissolved partnership with his co-defendants, indorsed a bill in the names of the firm, got it discounted by the plaintiff, and applied the proceeds in discharge of a debt due from the partnership, and yet it was held, that the plaintiff could not recover against the other parties, because it did not appear that Finlyson was authorized by them to raise the money and apply it in that manner. Here Tatlock was not authorized by the defendant to receive the money in question, and there was no proof of the manner in which he applied it.

LORD TENTERDEN, C. J. I am of opinion that this rule must be discharged. It appeared in evidence at the trial, that Collier was indebted to Tatlock and the defendant, on a bill of exchange which he was unable to pay when it became due. He was then informed of an intended dissolution of partnership between the defendant and Tatlock, and upon the application of the latter, who appears to have managed the concerns, a warrant of attorney was given to him alone in August, 1821. The partnership, however, was not dissolved until the last day of that year, and if an action had been commenced by both partners to recover the debt immediately after the warrant of attorney was given, there can be no doubt that they might have recovered. In the month of October, Collier committed an act of bankruptcy; after that, and after the dissolution of partnership, the money in question was paid to Tatlock. The terms upon which the dissolution took place were not in evidence, but if they contained any stipulation that could have had the effect of exonerating the defendant from his liability, that should have been shown by him. In the absence of any such proof, I think that payment to one was in law payment to both, and that the money received after the act of bankruptcy may be recovered from the defendant.

BAYLEY, J. The money was paid in respect of a debt due to the partnership; both the partners were, therefore, prima facie, liable to refund it to the assignees of the bankrupt. If there had been a bargain between Tatlock and the defendant, which made it the receipt of Tatlock alone, that should have been proved by the defendant. The warrant of attorney was not, of itself, sufficient to make that out in the absence of any evidence that Tatlock was to retain the money to his own use.

HOLROYD, J. A judgment taken by one of two joint creditors, does not extinguish the debt, unless it be clearly taken with the concurrence of both. The debt, therefore, in the present case, remained due to the defendant jointly with Tatlock, notwithstanding the warrant of attorney.

LITTLEDALE, J., concurred.

Rule discharged.

There was also an action of trover between the same parties, brought to recover the value of the goods deposited by Collier with Tatlock and the defendant, as mentioned in the former case, and sold by Tatlock after the dissolution of partnership. In this case also, a rule for entering a nonsuit had been granted, and, after the former case had been disposed of,

*Denman* was called upon to support his rule; and he contended that the sale by Tatlock, after the dissolution, was a wrongful act, for which he alone, and not the defendant, was responsible.

LORD TENTERDEN, C. J. The goods were originally deposited with Tatlock and the defendant, and they continued to be identified with respect to those goods from that time down to the time of the sale. The plaintiffs, therefore, are entitled to retain the verdict.

Rule discharged.

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EDMONDS v. LOWE. — p. 407.

In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him. For the defendant, it was stated that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer; that it was indorsed and delivered to the acceptor, in order that he might get it discounted, and that he delivered it to the plaintiff, upon condition, that if he procured cash for it, he might retain out of it the amount of the debt due to him from the acceptor, but that he never did get cash for the bill: Held, that the acceptor could not be examined to prove these facts; for although he was uninterested as to the amount sought to be recovered on the bill, he was interested as to the costs against which he would have to indemnify the defendant, if the plaintiff obtained a verdict.

ASSUMPSIT by the indorsee of a bill of exchange for 198*l.*, drawn by the defendant upon one Benzville, and accepted by him, and indorsed by the defendant. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after last Michaelmas term, the plaintiff proved the acceptance, indorsement, and dishonor of the bill. On cross examination of his witness it appeared that he before held a check for 70*l.*, drawn by Benzville, which had been dishonored, and that Benzville brought the bill in question, and asked the plaintiff to exchange drafts with him, which was done. For the defendant it was stated, that Benzville being indebted to the defendant in the sum of 350*l.*, the bill in question was accepted by him for a part of that debt, and he offered to get it discounted. In order that he might do so, the defendant indorsed the bill, and delivered it to Benzville, who carried it to the plaintiff, (a bill broker,) and told him, that the defendant wanted cash for it, and that if he would procure cash for it, he might retain out of the proceeds 70*l.*, which Benzville owed him. The plaintiff took the bill upon those terms, but never got it discounted, and never gave any value for it. Benzville was called as a witness to prove these facts, but was objected to on the ground of interest, and rejected; whereupon the plaintiff obtained a verdict. In Hilary term a rule nisi for a new trial was obtained; and now

Sir J. Scarlett and Patteson showed cause. Benzville was interested in the event of the cause. The plaintiff was, according to his own case, entitled to recover 70*l.* on the bill; as to that sum the acceptor was, perhaps, indifferent, but if the plaintiff recovered, he would be liable over to the defendant, not only for the amount of the verdict, but for

the costs also, whereas, if the defendant succeeded, he (Benzeville) would only be liable to the plaintiff for the 70*l*.

*Denman and Chitty, contra.* Benzeville, in his negotiation with the plaintiff for the discount of this bill, acted as agent for the defendant. Now the servants of tradesmen who deliver goods, and other agents who alone have knowledge of the transactions in dispute, are constantly admitted to give evidence *ex necessitate*, although, strictly speaking, they are interested in the result of the action.

Lord TENTERDEN, C. J. I am of opinion that the testimony of Benzeville was properly rejected. It appeared by the statement of the defendant's counsel that Benzeville was answerable for the payment of the bill by himself, and there was an implied undertaking by him to indemnify Lowe. He was, therefore, interested in the result of the action, inasmuch as the costs, if the plaintiff succeeded, would ultimately fall upon himself. But it has been argued, that he was excepted out of the general rule by reason of his employment as agent for Lowe; that however applies only to agents employed in the ordinary transactions of commerce, then they are, *ex necessitate*, excepted out of the rule, and admitted to give evidence, but here Benzeville's only connexion with or agency for Lowe arose out of the transaction in question; he was not, therefore, competent to give evidence.

The rule for a new trial was ultimately made absolute, upon reading certain affidavits put in by the defendant.

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Ex parte GREGORY.—p. 409.

BALGUY moved for leave to enter up judgment on an old warrant of attorney, given as a collateral security, together with a mortgage. The affidavit on which the motion was founded was entitled "In the King's Bench," but not in any cause.

*Per Curiam.* As there is not, in fact, any cause in court, the title of the affidavit is sufficient.

Motion granted.

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COLE et Ux. v. ROBERT EAGLE and Others.—p. 409.

The stat. 8 H. 6, c. 9, s. 6, which gives treble damages to the party grieved, by a forcible entry and expulsion, applies only to persons having the freehold; for the remedy is given against the disseisor.

TRESPASS for breaking and entering the dwelling-house of the wife dum sola, and expelling her therefrom. The first count was framed on the stat. 8 H. 6, c. 9, and stated that the wife "was possessed of the dwelling-house, as tenant thereof to T. K. Eagle, for so long a time as they should respectively please," that defendants, with a strong hand, entered the house, and expelled her. There were other counts in trespass in the ordinary form. The defendants pleaded the general issue. At the trial a verdict was found for the plaintiffs, with 5*l*. damages, and judgment was entered up generally for that sum and treble costs, which were allowed. by the Master on the ground that the plaintiffs were entitled to them un-

der the 8 H. 6, c. 9, s. 6. A rule nisi for a review of the Master's taxation having been obtained,

*F. Kelly* showed cause. By the stat. 8 H. 6, c. 9, s. 6, it was enacted, that a person put out, or disseised of any lands in a forcible manner, may have assize of novel disseisin, or a writ of trespass, and if the party recover, he shall have treble damages against the defendant. Here then the plaintiffs were entitled to treble damages, and, consequently, to treble costs, *Pilfold's* case, 10 Co. 116. It is true that judgment has been entered up for single damages only, and the plaintiffs may be considered as having waived the treble damages, but that does not deprive them of their right to treble costs.

*Wightman*, contra. The first count only was framed upon the statute, and the damages were taken generally upon the whole declaration. The plaintiffs, therefore, had no right to enter up judgment for treble damages, and consequently had no right to more than single costs; for they can only have treble costs as incident to treble damages. But, supposing that not to be a sufficient answer, the statute 8 H. 6, does not apply to this case, the wife was at most only tenant from year to year, and the statute applies only to parties forcibly dispossessed of a freehold. The words in s. 6, are, that "the party grieved shall have assize of novel disseisin, or a writ of trespass against such disseisor." He was then stopped by the Court.

Lord TENTERDEN, C. J. I think it is quite plain that the statute was intended to apply to those only who have the freehold. A disseisor is one who takes the freehold; and this is easily accounted for; at the time when the statute in question was passed, no tenants at will or from year to year were known.

BAYLEY, J. The case of *Rex v. Dormy*, 1 Ld. Raym. 610, shows that a party is not within the statute, unless he has the freehold.

Rule absolute. (a)

(a) See *Fitz. N. B.* 560, 8th edit. *Dalaber v. Lyster*, 2 Dyer, 142. *Anonymous*, Sav. 68, pl. 141. *Anonymous*, 1 Ventr. 306. 3 Bulstr. 71. *Rex v. Wannop*, Say, 142.

### MAGRAVE v. WHITE. — p. 412.

Where the speaker of the House of Commons certified that a certain sum was due to A. B., "a witness summoned by and on behalf of C. D., one of the sitting members for Dublin, to give evidence before an election committee;" the Court ordered judgment to be entered up against C. D. for that sum as upon a warrant of attorney, the certificate being held conclusive as to the fact of the witness having been summoned, and the stat. 53 G. 3, c. 71, being held applicable to witnesses summoned by a sitting member, as well as to those summoned by a petitioner.

THIS was an action by the plaintiff against the defendant, to recover the expenses incurred by him in attending as a witness before an election committee of the House of Commons.

*Starkie* now moved for leave to enter up judgment for the plaintiff, upon the speaker's certificate, given in pursuance of the 53 G. 3, c. 71. The certificate was as follows: "Whereas T. R., Esq., clerk-assistant to the House of Commons, and S. C. Cox, Esq., one of the masters of the High Court of Chancery (who were duly authorized and directed by me, according to the 53 G. 3, c. 71, entitled, 'an act for amending and rendering more effectual the laws for the trials of controverted elections, and returns

of members to serve in parliament,' to examine and tax the costs and expenses of C. M., *a witness summoned by and on behalf of H. W., one of the sitting members* for the county of Dublin, incurred by the said C. M. in attending as a witness for and on behalf of the said H. W., to give evidence before the select committee appointed to try and determine the merits of the petition of G. R. and others, complaining of an undue election and return for the said county of Dublin), have examined and taxed the said costs and expenses of the said C. M., and have reported to me the taxed amount thereof; such examination and taxation having been attended by the attorneys or agents of the said C. M. and H. W. Now I do hereby certify, that the said taxed costs and expenses of the said C. M. do amount to the sum of 47*l.*, which sum I do hereby certify to be due and payable from and by the said H. W., as such sitting member as aforesaid, to the said C. M. as such witness as aforesaid. And I do hereby further certify, that the fees due and payable upon such taxation do amount to 9*l.* 14*s.* 8*d.*, which last mentioned sum (making together, &c.) I do further certify to be due and payable from and by the said H. W. to the said C. M., the same being charged against the party at whose instance the said C. M. was summoned to attend the said select committee, but which sum of 9*l.* 14*s.* 8*d.* I do lastly certify, hath in the first instance been paid by the said C. M. in order to obtain this certificate." Signed by Charles Manners Sutton, speaker.

By the seventh section of the statute upon which the certificate is founded, it is enacted, That in all cases where any question shall arise as to the amount of the reasonable costs, expenses, or fees which shall be due and payable to any witness upon the trial of any such petition, the speaker shall direct them to be taxed, and give a certificate of the amount in the manner that has been pursued; and by s. 13, it is enacted, "That in any action which shall be commenced for the recovery of any costs, expenses, or fees which shall have been certified by the speaker, the certificate shall have the force and effect of a warrant of attorney; and the court in which the action is brought, shall, upon production of the certificate, enter up judgment for the sum therein mentioned." These two sections are general in their terms, and apply to all witnesses, whether summoned on behalf of the petitioner or the sitting member. The speaker, therefore, had, under the seventh section, power to grant the certificate in question, and by the thirteenth section, this Court are empowered to act upon the speaker's certificate whensoever he is authorized to grant it.

*Adam, and Law, contra.* Supposing the statute 53 G. 3, to extend to witnesses summoned on behalf of a sitting member, still, in the present case, the Court cannot grant this motion, for there is no proof that the party applying was summoned. [Lord Tenterden, C. J. It is stated on the face of the certificate that he was summoned.] An order for the taxation of costs under this statute, is always made by the speaker on a mere suggestion that the party was summoned. Nor has the speaker authority to inquire into the fact, or to direct an inquiry; his power under this statute is confined to cases where the amount payable is the only thing in dispute. With respect to the other question, it seems that the legislature never intended to provide this summary remedy against the sitting member. The main object of the act seems to have been, to secure the payment of costs occasioned by frivolous and vexatious petitions. The 28 G. 3, c. 52, provided for the payment, by the petitioner, of the costs incurred by the sitting member. This statute

extends the remedy to witnesses summoned by the petitioner. Sect. 7, although general in its terms, and speaking of *all* cases and *any* witness, refers to the 28 G. 3, c. 52, which affected petitioners only. [Lord Tenterden, C. J. The reference is only as to the mode of taxing the costs.] The preamble to the third section is as general as the words of the seventh—"And whereas it is expedient that provision shall be made to ensure the more punctual payment of *all* costs, expenses, and fees which may become due to witnesses, officers of the house, and parties, by reason of the trial of controverted elections;" and yet, the enactment which follows is clearly confined to petitioners only. The generality of the description, therefore, in the seventh section, is not sufficient to show that it was meant to apply to the sitting member. In the thirteenth section, also, the expression "*any* action" occurs, but that does not vary the argument, for its operation is expressly confined to cases in which the former parts of the statute authorize the giving a certificate.

*Starkie*, in reply. There is no doubt that the speaker has authority to decide whether a person has been summoned as a witness for a petitioner; he must, therefore, have the power in the case of a witness for a sitting member, for the objection, if good for anything, applies equally to both cases.

LORD TENTERDEN, C. J. I am of opinion, that upon the production of the speaker's certificate, we are bound to order judgment to be entered for the amount certified to be due. Two objections have been taken to this course: First, that the certificate may have been granted without a due inquiry as to whether the witness was summoned; and that the speaker had no power to make such inquiry; and this would apply equally to all witnesses, either for the petitioner or sitting member. I think, we are bound to assume that the speaker will not certify that costs have been taxed to a witness *summoned*, unless he has had due proof before him that the witness was summoned. If the practice suggested be usual, which we cannot assume, application should be made to the speaker to correct it.

As to the other objection, viz. that the statute applies only to witnesses summoned for the petitioner, I think it is not so limited. In the seventh section we find the general terms *all cases*, and *any witness*; but if we could see clearly by other parts of the statute, that those words were intended to apply only to witnesses for the petitioner, we ought to give them that more limited construction. I am, however, at a loss to find anything in the statute showing such an intention. The preamble to the third section has been relied on to show that general words may have the limited sense contended for, inasmuch as that preamble, in terms, extends to all cases, whereas the enactment that follows is confined to the petitioner only. But I am not aware of any rule of construction that confines the application of a preamble to the section immediately following. If that had been intended, I should have expected the recital to have applied to costs and expenses "*payable by the petitioner*," and not generally, to those "*becoming due by reason of controverted elections*." But the words of the seventh section are as general as those of this preamble, and as there is no rule confining the application of it to the third section, I think it may with propriety be applied to the seventh also; and that, taking the preamble and that section together, it is clear, that the statute was intended to apply to costs and expenses becoming due from the sitting member as well as the petitioner.

BAYLEY, J. The real question is, Whether this summary remedy for their expenses is to be given to witnesses summoned for a petitioner, and

not to those summoned for the sitting member. The supposed difficulty as to the proof of summons applies equally to both; but I think the certificate is conclusive as to that point. Then, as to the other question, it seems to me that the recital before the third section is applicable to the seventh, and that both being general in their terms, there is nothing to show an intention to confine their operation to one class of witnesses only. Again, the twelfth section provides a specific remedy for witnesses on behalf of the petitioner, by forfeiture of his recognizances; the thirteenth section is, therefore, of comparatively small importance to them; but if it does not extend to the sitting member's witnesses, the statute has made no provision in their behalf. I cannot, therefore, entertain a doubt that we ought to order judgment to be entered up for the amount certified to be due in this instance.

HOLROYD, J., not having been present during the argument, declined giving any opinion.

LITLEDALE, J., concurred.

Motion granted.

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The KING v. SUTTON and Others. — p. 417.

Alienage is a ground of challenge to a juror; and if the party has an opportunity of making his challenge, and neglects it, he cannot afterwards make the objection. *Semble*, That since the 7 G. 4, c. 60, s. 27, alienage is not a ground even of challenge to a special juror.

INDICTMENT for a conspiracy. Plea, not guilty. At the trial, before Lord *Tenterden*, C. J., at the London sittings after last Hilary term, Sutton, and some other defendants, were found guilty, others were acquitted. The parties convicted being now brought up for judgment,

*Denman*, on behalf of Sutton, moved for a new trial, on an affidavit that a special juror, who served on the trial, was an alien, and that this fact was not known to the defendant until after the trial. The 6 G. 4, c. 50, for consolidating and amending the laws relating to jurors and juries, in the first section enacts, that every man (except as thereafter excepted) being the owner or occupier of certain descriptions of property there specified, shall be qualified and liable to serve on juries. In s. 2, there are certain exemptions from his liability, and s. 3 is expressly applicable to this case: "Provided also, that no man, not being a natural born subject of the king, is or shall be qualified to serve on juries or inquests, except only in the cases hereinafter expressly provided for;" which exception applies to juries *de medietate*. The subsequent provisions as to special juries do not introduce any new description of persons as qualified to serve, but relate only to the mode of selecting special jurors out of the general description before given. [*Bayley*, J. What is the consequence if a person not entitled to do so, serves as a jurymen?] The decision of the jury is void, and a new trial must be granted, *Rex v. Tremearne*, 5 B. & C. 251.

The *Solicitor-General*, (with whom was *Bosanquet*, Serjt.) contra. The word *qualified* is applied to aliens in the third section, in the same sense in which it is applied to other persons in the first section. Now by the twenty-seventh section it is enacted, "That if any man shall be returned as a juror for the trial of any issue in any of the courts hereinbefore mentioned, who shall not be qualified according to this act, the want of

such qualification shall be good cause of challenge ;” and the section concludes with a proviso “that nothing therein contained shall extend in any wise to any special juror.” (He was then stopped by the Court.)

Lord TENTERDEN, C. J. The enactment in the 27th section of this statute agrees precisely with that which had before been established by the common law, for in Co. Lit. 156, b. it is stated that aliens born may be challenged propter defectum patriæ. Now, I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge. In the case cited, no such opportunity had been afforded. We ought to be very careful in giving way to such an application, for if we must grant a new trial at the instance of a defendant after conviction, we must, also, do it at the instance of a prosecutor, when there has been an acquittal ; and it seems to me that, without a precedent, we ought not to interfere in this late stage of the proceedings. The proviso also, at the end of the 27th section, appears to have the effect of taking away even this right of challenge in the case of a special juror ; probably because the party has had an earlier opportunity of making the objection.

Rule refused

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The KING v. RICHARDS and Others. — p. 420.

The stat. 7 G. 4, c. 74, s. 23, which provides for the allowance of costs to prosecutors and witnesses in certain cases of misdemeanor, does not apply where the indictment has been removed into K. B. by certiorari.

IN pursuance of a recognisance entered into before magistrates, the prosecutor, at the quarter sessions for Salop, preferred an indictment against the defendants for a riot ; and the grand jury having found it a true bill, he afterwards removed it into this court by *certiorari*. The defendants were tried and convicted at the last Spring assizes for the county of Salop, and in Easter term

*Campbell* moved for a rule to show cause why the prosecutor should not have his costs allowed under the 7 G. 4, c. 64, s. 23, by which it was enacted, “that where any prosecutor, or other person, shall appear before any court on recognisance or subpoena to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, &c., every such court is hereby authorised and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony.”

The Court took time to consider of the application, and now

Lord TENTERDEN, C. J., said, that the matter had been considered by the twelve Judges, who were all of opinion that the act does not apply to cases where the indictment has been removed into the Court of King’s Bench by *certiorari*.

Rule refused.



## MOSES v. RICHARDSON. — p. 421.

THE defendant, who was a married woman at the time when this action was brought, being sued as a feme sole, had suffered judgment to go by default, and had been taken in execution.

*Archbold* now moved to discharge her out of custody, on the ground that she was a married woman.

Lord TENTERDEN, C. J. The defendant ought not to have suffered the plaintiff to incur the expense of executing a writ of inquiry. She must be left to her writ of error.

Rule refused.

## MURRAY v. REEVES, Gent., one, &amp;c. — p. 421.

A., an insolvent, having petitioned the court for the relief of insolvent debtors to be discharged out of custody; and having been brought up before that court to be examined, was opposed by B., a creditor, and remanded to a future day. Before that day arrived, C., who acted as the attorney of A., in consideration of B.'s withdrawing his opposition to A.'s discharge, undertook that B. should be the sole assignee of A.'s estate, and should receive 100*l.* out of it within three weeks from his appointment: Held, that this agreement was contrary to the policy of the insolvent act, and therefore void.

ASSUMPSIT for the breach of an agreement. Plea, non assumpsit. At the trial, before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term, 1827, the following appeared to be the facts of the case: The plaintiff had recovered judgment against Alexander Shearer for 268*6**l.* The latter being detained in execution at the suit of the plaintiff, petitioned the court for the relief of insolvent debtors to be discharged out of custody. He was brought up for that purpose on the 21st of July, but was opposed by the plaintiff, and by his consent, it was referred to an officer of the court to examine the insolvent, and to make a report to the court. The insolvent was remanded on the 21st of July. Before that day, the following agreement (for the breach of which the present action was brought) was entered into between the plaintiff and the defendant, the latter then acting as the attorney of Shearer. "On condition of Mr. Murray withdrawing his opposition, Mr. Reeves will undertake to consent that Mr. Murray shall be sole assignee of Mr. Shearer's estate and effects; and to guarantee that Mr. Murray, as assignee, shall receive 90*l.* or 100*l.* out of the insolvent's estate within three weeks from his appointment as assignee, he taking the necessary steps, which Mr. Reeves will point out to him; and also to guarantee 40*l.* in lieu of the furniture and effects which the assignee is entitled to as vesting in the insolvent in right of his wife, who is now in Paris." On the part of the defendant it was contended, that this agreement was contrary to the policy of the law, and *Nerot v. Wallace*, 3 T. R. 17, was cited, where a promise having been made by the defendant, a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine the bankrupt concerning certain sums of money with which he was charged, he, defendant, would pay those sums; the court held that the consideration was void, it being contrary to the policy of the bankrupt laws. Lord Tenterden, C. J., was inclined to think that the contract between Murray and Reeves was illegal, but he reserved the point, and a

verdict was found for the plaintiff for 105*l.*, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

*Campbell* and *Wyborn* on a former day in this term showed cause. This agreement is not contrary to the policy of the insolvent debtor's act. *Nerot v. Wallace*, 3 T. R. 17, was decided on the bankrupt laws. Those laws impose certain duties on the bankrupt, the assignees, and the commissioners; and any agreement, the effect of which may be to prevent the performance of those duties, is void. That case was decided partly on the ground that the promise made by the assignees and which was the consideration for the defendant's promise, it was not in their power to perform. And Lord *Kenyon* admitted that if *all* the creditors had consented to the agreement, it would have been valid. In the present case the plaintiff undertook for nothing which he could not perform. In *Kaye v. Bolton*, 6 T. R. 134, a covenant by a friend of the bankrupt to pay ali his creditors their full debts, in consideration that they would not proceed any further under the commission, was held to be valid. The detention of the insolvent in custody is for the benefit of the detaining creditor, who may renounce that benefit, and consent to the discharge of the insolvent even after he has been committed by the commissioners for a certain time; and if so, this agreement to consent to his discharge before examination must also be valid.

Sir *J. Scarlett* and *Hutchinson*, contra. The defendant's promise is founded upon a consideration that the plaintiff would withdraw his opposition to the discharge of an insolvent debtor, who had been brought before the Court to be examined. The object of the statute 1 G. 4, c. 119, was twofold: first, to relieve the insolvent debtor from imprisonment; secondly, to secure the creditors of the insolvent against fraud. The eighteenth section enacts, that "if it shall appear that the prisoner has been guilty of fraud, &c., the Court may order him to be imprisoned for three years." The effect of the agreement in this case was to prevent all examination into the conduct of the insolvent, and to withdraw him wholly from the penal jurisdiction of that Court. Such an agreement is, therefore, contrary to the policy of the act, and is calculated, also, to be injurious to the other creditors; for they may have been induced to withhold their opposition, because they believed that the plaintiff would oppose the discharge of the debtor, and thus the full disclosure of his property, which it was the object of the legislature should take place, would be prevented. The creditors will also be deprived of the benefit of the judgment, which, if the debtor be discharged, may be entered up for their benefit under the twenty-fifth section, and which would be available against property acquired by him subsequently to such discharge.

Lord *TENTERDEN*, C. J., now delivered the judgment of the Court.

This was an action on an agreement, whereby the defendant, in consideration of the plaintiff's withdrawing his opposition to one *Shearer*, who had applied for his discharge under the act for the relief of insolvent debtors, undertook, among other things, to consent that the plaintiff should be the sole assignee of the estate of *Shearer*, to guarantee that the plaintiff should, as assignee, receive a sum of 90*l.* or 100*l.* out of the insolvent's estate within three weeks from his appointment as assignee, he taking the steps that the defendant should point out to him, and also to guarantee a sum of 40*l.* in lieu of the furniture and effects to which the

assignee might become entitled as vesting in the insolvent in right of his wife. And the action was brought in respect of these two sums of money. At the trial, it appeared that Shearer had, in fact, been under examination as to his schedule, which is the usual practice of the Court in cases of opposition. And on the part of the defendant, it was insisted, that this engagement being made in consideration of withdrawing a creditor's opposition to the discharge of an insolvent debtor, was void in law. And we are of that opinion. It is obvious that a measure of this kind takes from the commissioners that superintendence, control, and power of imprisonment for a time, which the legislature intended to vest in them, and, consequently, deprives the other creditors of the benefit of that full disclosure, voluntarily and freely to be made, which they are entitled to have. Such bargaining, whatever may have been intended or effected in the particular case, may, in many cases, give protection to a fraudulent concealment, to the great prejudice of creditors, and is, therefore, in our opinion, contrary to the policy of this part of the law, and consequently void. It was urged, that a creditor may lawfully make such a bargain as the present, because he may at any time consent to the discharge of the debtor, even after he shall have been committed or remanded by the commissioners for a certain time. It may be true that a creditor may so consent, but if the debtor obtains his discharge in that manner, his relief under the statute, as to the debts of other creditors, will, in many cases, be rendered questionable; and if the imprisonment be under the seventeenth section, for fraudulent concealment, it will probably be lost. Whereas if the opposition made by one creditor be withdrawn, and no other creditor takes up the proceeding, the debtor may obtain the full benefit of the statute, without making that disclosure which the statute requires; and where one creditor has begun an opposition and withdraws it, other creditors may lose the opportunity of opposing, or may abstain from doing so under an opinion that the debtor has done all that the law requires of him. The law requires that the debtor shall make a full disclosure, and that he shall do so in the first instance by his schedule; a knowledge that the effect of concealment may be obviated by subsequent bargaining, may operate as an inducement to concealment in the first instance, which ought to be discouraged by all practical means. Bargains like the present may also, in some cases, if allowed, operate to the prejudice of an honest debtor, whose friends may be willing to make some sacrifice in order to relieve him from a vexatious, though, perhaps, groundless opposition.

For these reasons, we think that the rule to enter a nonsuit should be made absolute.

Rule absolute.

The President, Directors and Company of the BANK of the State of SOUTH CAROLINA, in the United States of America, v. JOHN ASHTON CASE, JOHN JACKSON, and WILLIAM BROWN, Assignees of the Estate and Effects of THOMAS CROWDER and HENRY THOMAS PERFECT, Bankrupts. — p. 427.

A., B., and C. carried on business in copartnership as factors and commission merchants in England and America; in England, under the firm of A., C., and Co.; in America, in the name of C. alone. When C. went to America, he had written instructions from his partners, one of which was, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." A., B., and C., in order to obtain consignments from America, made advances or granted drafts or bills of exchange, or indorsements of them, to their principals, on the security of the goods consigned. In order to obtain a consignment from W., C. in his own name indorsed bills for him, which were to be provided for by others drawn by W. on A., C., and Co. in England, which were to be provided for by the proceeds of the consignment. Before the latter bills were presented for acceptance, A. and B. had become bankrupts: Held, that the indorsement of the bills by C. must be considered as an indorsement by the firm, and that they were liable upon those bills.

THIS was an issue, directed by the Vice-Chancellor, to try whether Thomas Crowder and Henry Thomas Perfect, the bankrupts, and James Butler Clough, were, on the 13th day of August, 1825, (the date of the commission of bankrupt against Crowder and Perfect,) indebted to the said plaintiffs in any, and what sum of money. The issue stated a promise by the defendants to pay the plaintiffs one shilling for every pound of the debt which might be due to the plaintiffs. And the plaintiffs averred 15,000*l.* to be due. The cause came on to be tried before *Hullock, B.*, at the assizes for the county of Lancaster, when a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:— On the 3d of November, 1815, J. B. Clough entered into articles of copartnership with Thomas Crowder and Henry Thomas Perfect, the bankrupts, whereby they agreed to carry on the trade or business of a consignee or factor for persons trading from the United States of America to England, and such other branches of business as they should mutually agree upon, in copartnership for the term of four years, from the 1st of January then next; and by a clause in the articles it was declared that the firm of the partnership should be "Crowder, Clough and Co." It was also stipulated by the articles, that Perfect should forthwith proceed to the United States of America to advance the business of the concern as consignees or factors, and in such other manner as might best answer the purposes of the partnership. That no one of the parties should carry on or be concerned in the business before mentioned on their own separate account, nor carry on any trade in partnership with any other person or persons whomsoever during the said term, nor should they carry on any trade or business on their own account, distinct from the said partnership, nor carry on any in the name of the firm of the said partnership, or on account thereof, without the consent in writing of each of the parties. That proper books of ac-

count should be kept in England and in America, while Perfect was resident there, in which, respectively, should be fairly entered and kept the accounts, dealings, and concerns relative to the aforesaid partnership transactions. He went accordingly, and transacted business in America for the partnership, but it was all done in his name. Perfect returned in 1819, and by an agreement, bearing date the 9th day of October, 1819, the partnership was extended two years upon the former terms, except in some particulars not affecting the present question; and the parties agreed that they would continue to carry on the said trade or business for that time, and such other branches of business as they should from time to time mutually agree upon. And it was agreed that Perfect should have a yearly allowance of 600*l.* for such time as he should stay in America on the partnership account; and he again proceeded to the United States, where he continued two years, transacting the partnership business in his own name. On his return in 1821, it was agreed that the term of the copartnership should be again extended two years; and that the parties should continue to carry on the said trade or business, and such other branches of business as they should from time to time mutually agree upon, for that term; and that Clough should succeed Perfect: and a supplementary agreement was entered into, bearing date the 27th of October, 1821, upon the like terms as the former articles, except as thereby altered in some matters not affecting the present question. And it was agreed that Clough should proceed to the United States, and use his best endeavors for the general benefit of the concern, and should have a yearly allowance of 500*l.* for such time as he should remain in America on the partnership account. Previous to Clough's departure, written instructions were given him for his conduct in the United States. They bear date the 29th day of October, 1821, and were signed by Crowder and Perfect, and they were approved of as a guide for the future conducting of business. In the instructions are the following paragraphs—“No shipments to be made solely on our account, but the above price to regulate shipments in conjunction with other parties, when they require us to participate in the risk to induce them to make a consignment. It is to be hoped, however, that there will no necessity to extend this sort of business, and that it will be as much avoided as possible. Our main object is consignments, either of ships or produce, and with a view to secure such, should we be induced to risk a share of shipments, (if such can be had without, we should prefer it,) we should not wish a larger sum than 5000*l.* to be risked, even in the smallest degree, at any one time, in such participations; and the result of these shipments ought to be known, or safely calculated on, by advices from home, before any new arrangements are formed. It is understood that our names are not to appear on either bills or notes for the accommodation of others; and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here.” The business of Crowder, Perfect, and Clough was that of factors or commission-merchants for principals trading between Great Britain and the United States. Their business in this country consisted principally in the sale and purchase of goods, and the collection of freights for principals in the United States on commission. Their business in the United States consisted in the sale and purchase of goods, and in the collection of freights for their principals in England, on commission, and occasionally in the purchases of cotton, jointly with others, to secure a consignment; and sometimes Clough purchased cotton or

speculation, notwithstanding the clause in the instructions above set forth, viz., "That no shipments were to be made solely on their account ;" and in the course of this business Clough occasionally sold and purchased bills of exchange. In England the business of the house was carried on in the name of Crowder, Clough, and Co. ; in the United States all the partnership business was transacted in the name of J. B. Clough alone. The bankrupts in England, and Clough in the United States, procured consignments for their joint benefit on commission ; the bankrupts as to consignments to the United States for sale by Clough, and Clough as to consignments to England for sale by the bankrupts ; Clough using his own name only in these, as well as all other, transactions in the United States. In order to obtain consignments from the United States, the bankrupts and Clough made advances, or granted drafts or bills of exchange, or indorsements thereof, to their principals in the United States, upon the security of such principals' goods consigned to the bankrupts and Clough for sale in Great Britain ; and the business relating thereto was conducted as follows : first, In some cases, bills of exchange were drawn in the name of J. B. Clough upon Crowder, Clough, and Co., in favor of their principals, and were delivered to such principals ; secondly, In many other cases, bills of exchange were drawn by the principals upon Crowder, Clough, and Co., and indorsed in the name of J. B. Clough, and delivered to the principals with such indorsements ; thirdly, In other cases, bills of exchange were drawn by J. B. Clough, in his own name, on Crowder, Clough, and Co., and indorsed by him, and sold, and the proceeds advanced to the consignors ; fourthly, in other cases, J. B. Clough used to raise money for advances to consignors by drawing upon American houses in New York, or by the consignors drawing on them, and J. B. Clough provided for these bills by sending to the American houses bills on England to be discounted there ; bills on England not being always negotiable at Charleston. Consignments of cotton were procured by J. B. Clough, by means of these transactions, to the English house for sale, on account of the consignors, to a very great amount. Clough also bought and sold bills of exchange in his own name on speculation, the profit and loss whereof was carried to the partnership account. Clough also sold and purchased goods in America in his own name, for English principals, to a large amount. The profits made by the partnership in America, in commission and exchange speculations, in the name of J. B. Clough, were very considerable, amounting in 1822 to 1377*l.*, in 1823 to 2700*l.*, in 1824 to 5000*l.*, but in 1825 there was a loss. Proper partnership books were kept ; the bankrupts entering in their books all the dealings and transactions in this country, and Clough entering in the books kept by him in America all the dealings and transactions in the United States. At the end of each year the annual balance of profit and loss in England and in the United States was divided between the partners. Clough, during the whole time that he was in the United States, viz., from 1821 to the bankruptcy, never traded or drew, indorsed, accepted, or negotiated any bills of exchange, or carried on any business on his own account. But he entered into a joint speculation, intending it to be on the partnership account, with two persons, Joshua T. Weyman and Michael Lazarus, in his own name, to the extent of 100,000*l.* and upwards, notwithstanding the clause in the instructions above set forth, viz., "We should not wish a larger sum than 5000*l.* to be risked, even in the smallest degree, at any one time in such participations." This transaction

was afterwards adopted by the bankrupts. He had no individual business whatever, and the name of J. B. Clough was never used by him in trade, or in drawing, indorsing, or accepting, or negotiating bills of exchange, except for the benefit and on account of the partnership; and all the partnership business in the United States was carried on in that name, and no other, save when the consignors of goods drew bills of exchange on England on account of their consignments; in which cases they always drew on Crowder, Clough, and Co. Clough was restricted by the partnership articles from transacting any business there in any manner whatever, except on the partnership account. Clough, who was the only witness examined on either side at the trial, swore that there was no specific agreement between him and his partners that there should be a house under the name of J. B. Clough in America; that he was sent out to form a branch of the house in America; that he had instructions not to use their name; that he had no doubt that they intended he should form a branch of the house, and that the branch was carried on in America in the name of J. B. Clough, with the sanction of all the three partners, although there was no specific agreement that it should be so carried on. Clough obtained from J. T. Weyman, of Charleston, consignments of a large quantity of cotton to the house of Crowder, Clough, and Co., for sale on J. T. Weyman's account, and it was agreed between Weyman and Clough that J. T. Weyman should draw bills upon Coffin and Weyman, of New York, merchants, payable to Clough, and that Clough should indorse them; it being understood between them that the Carolina Bank would discount them, in order to make advances to J. T. Weyman on the credit of the consignments. Four bills were accordingly drawn by Weyman on Coffin and Weyman for 40,000 dollars, payable to J. B. Clough or order, and being indorsed "J. B. Clough," were discounted by the plaintiffs, who are a banking corporation duly constituted by the laws of the United States. It was further agreed between Clough and the consignor, J. T. Weyman, that the latter should draw other bills on Crowder, Clough, and Co., in order to provide Coffin and Co. with cash to pay the four bills on them when at maturity, which latter bills were to be paid by Crowder, Clough, and Co. out of the proceeds of the consignments in their hands. Bills were accordingly so drawn, and sold by Coffin and Co. to the amount of 5000*l.*, which house, however, stopped payment soon afterwards, and the proceeds of the bills were misapplied; and Crowder, Clough, and Co. soon afterwards failing, the bills upon them were not paid. All the consignments, however, agreed to be made by J. T. Weyman to the house in England were made, and received by the English house, and disposed of by them. Bills on England are not, in general, negotiable in Charleston; this was the cause of the arrangement for drawing bills in the first instance on Coffin and Weyman. The bills in question were duly presented to Coffin and Co. at maturity, and dishonored, and due notice given to J. B. Clough in America. The value of the bills in question, in English money, is 8333*l.* 6*s.* 8*d.* These particular bills were not entered by J. B. Clough in the books kept by him, because the agreement with J. T. Weyman was, that bills were to be drawn on Crowder, Clough, and Co. to such an amount as precisely to raise the amount of the four bills on Coffin and Co., and thereby exactly reimburse their payments; and as the bills so drawn would be paid in England out of the proceeds of the consignments, no profit or loss could arise to J. B. Clough or his partners from the sale of

these bills on Coffin and Co. in America, and, therefore, no entry was made by J. B. Clough in the books kept by him. J. B. Clough had no separate estate. If the plaintiffs are entitled to recover, a verdict is to be entered for 416*l.* 13*s.*, the amount of the debt due from Crowder, Perfect, and Clough being 8333*l.* 6*s.* 8*d.*; if not, a nonsuit is to be entered.

*Parke* for the plaintiffs. It is clear that the bills in question were indorsed in the course of the partnership business of Crowder, Clough, and Co., and to raise funds for partnership purposes. They were indorsed in the name of J. B. Clough, and the only question is, whether that made him individually liable, or whether, under the facts found, that signature must be taken as the copartnership name. Now the case states, that all the business of the firm in America was carried on under that name. It is true that in *Ex parte Emly*, 1 Rose, 61, and *Emly v. Lye*, 15 East, 7, it was held that the indorsement of one partner does not make the firm liable, although the money thereby raised may be applied to partnership purposes, if the indorsement cannot be treated as the indorsement of the firm; but, on the other hand, it is clear that a firm consisting of several may carry on business in the name of an individual partner, and then the whole firm will be bound by acts done by him as representing the firm: *Ex parte Bolitho*, Buck. 100. The only question, therefore, is, whether the name of J. B. Clough on these bills, is to be treated as the copartnership name. Clearly it must, for all the business in America was carried on in that name, with the sanction of the partners in England, and the transaction in question was for the benefit of the partnership.

*Patteson*, contra. This transaction was clearly a discount for the accommodation of J. T. Weyman, and not for the use of the partnership. If the name of J. B. Clough, in which the bills were indorsed, can be considered as the name of the firm, he, by making that indorsement, violated the instructions given when he went to America, in which it is expressly stated, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." Now the authority of one partner to bind the firm, must depend upon the partnership articles. Here Clough had no such authority, the bills in question being for the accommodation of others, and not regarding a direct transaction with the house in England. This mode of dealing might have rendered the firm of Crowder, Clough, and Co. liable to two sets of bills, those now in question, and the second set, drawn upon Crowder, Clough, and Co., and which, but for their failure, would have been accepted by them.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J., who after stating the case said — Upon these facts it is contended, that the parties are to be charged as indorsers, that is, that the indorsement by J. B. Clough is to be considered as an indorsement by the house of which he was a member; and we think that, under the circumstances stated in the case, J. B. Clough is to be considered as the name of the firm for the purposes of business in America.

That being so, the bankrupts and Clough were liable as indorsers of the bills; and a verdict must be entered for the plaintiffs for the sum agreed upon at the trial.

Postea to the plaintiffs.



## GIBBINS and Another, Assignees, v. PHILLIPS.— p. 437.

After a verdict for a defendant, the Court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial. The record was carried down to the Spring assizes following, when it was made a remanet. It was tried a second time at the Summer assizes, when a verdict was again found for the defendant. The Court afterwards ordered that that verdict should be set aside, and a new trial had between the parties upon the payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial. Upon the third trial a verdict was found for the plaintiff: Held, that the plaintiff was entitled to the costs occasioned by the cause having been made a remanet at the assizes next following the term when the first rule was made absolute for a new trial.

THIS cause was tried at the Summer assizes for the county of Stafford, 1826, when a verdict was found for the defendant. The Court ordered that that verdict should be set aside, and a new trial had between the parties, and that the costs of the former trial should abide the event of such new trial. The record was again carried down to the Spring assizes, 1827, when it was made a remanet. It was tried a second time at the Summer assizes, 1827, when a verdict was again found for the defendant. The Court afterwards ordered, that that verdict should be set aside, and a new trial had between the parties upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial. The costs of that trial (not including those of the remanet) were paid by the plaintiffs to the defendant. The cause was tried a third time at the Spring assizes, 1828, when a verdict was found for the plaintiffs. The master allowed to the plaintiffs the costs (177l. for witnesses), occasioned by the cause having been made a remanet at the Spring assizes, 1827. A rule nisi having been obtained for the master to review his taxation,

*Taunton and Holroyd* showed cause. The general rule is, that where a cause is made a remanet, the costs thereby incurred abide the ultimate event of the cause, *Standen v. Hall*, Sayer, 272, *Sadler v. Evans*, 4 Burr. 1984. Here the plaintiffs have ultimately succeeded, and are entitled to the costs occasioned by the cause having been made a remanet.

*Barstow*, contra. The general rule undoubtedly is, that the costs of a remanet are considered costs in the cause, and go to the party who finally succeeds. But in this case a rule for a new trial was made absolute upon condition that the costs of the second trial should be paid by the plaintiffs. Now the Court must have intended to have included the costs of the remanet in the costs of that trial, for they in terms provide for the costs of the first and of the second trial. When those costs were incurred, the defendant had already obtained one verdict, and he afterwards had another. It was made a remanet in that stage of the proceeding when the defendant was successful. The costs are costs of the second trial.

Lord TENTERDEN, C. J. The general rule is, that the party who succeeds ultimately, is entitled to the costs occasioned by the cause having been made a remanet. Here the plaintiffs have ultimately succeeded. I think that, as a rule made by the Court after the second trial did not provide in express terms for the costs of the remanet, they ought to be considered as costs in the cause, and that they were properly allowed as such by the master. The present rule must, therefore, be discharged.

Rule discharged.

The KING, on the Prosecution of G. SPURGING, v. GILKES and Others.—p. 439.

An order of justices requiring the stewards of a benefit society to readmit A. B., who had been expelled, recited that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order: Held, that the recital was not evidence of the enrolment of the rules.

INDICTMENT stated that S. T. and W. B., esquires, two of the justices of our lord the King, made an order under their hands and seals, which order was as follows, that is to say: "Middlesex to wit, To W. Gilkes, S. Ward, R. Carpenter, G. Bowden, J. Hubbard, and J. M'Clean, stewards of a friendly society, called The Alfred Union Benefit Society, held at, &c., in the parish of Christ Church, in the county of Middlesex, and to each of them, and to all and every other member and members of the said society; whereas G. Spurging, of the parish of Christ Church, in the county of Middlesex, on the 19th March instant, at the police-office in Worship Street, Shoreditch, in the said county of Middlesex, came before us W. B. and S. T., two of the justices of our lord the King, assigned to keep the peace of our lord the King, in and for the county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, near unto the place where the said society is now established, and made a complaint upon oath, that he, G. Spurging, having been duly admitted a member of the society, established pursuant to the statutes in that case made and provided, thought himself aggrieved by a certain act done by the society, for being excluded from the benefit of the society, contrary to the rules, orders, and regulations of the society, and it appearing to us, *the said justices, that the said rules, orders, and regulations have been allowed and confirmed by the justices of the peace for the county of Middlesex, assembled at the general quarter sessions of the peace, holden in and for the said county, according to the directions of the said statutes, we, the said justices, did duly issue our summons to the stewards of the society, they being the principal officers of the society, to appear before us, the justices, and answer the complaint so made by him, G. Spurging, and thereupon, in pursuance of such summons, the said S. Ward, one of the stewards, R. Cole, the president, with others, members of the society, do appear before us, and we the said justices in the presence of S. Ward, one of the stewards, R. Cole, the president, and others, members of the said society, proceed to hear and determine, in a summary way, the matter of such complaint, according to the true intent and meaning of the said rules, orders, and regulations, and after hearing the allegations of G. Spurging, upon oath, and the allegations of S. Ward, R. Cole, the president, and others the members of the society, touching the premises, and having duly considered such allegations, we, the justices, do hereby adjudge and make order, that S. Ward, one of the stewards, R. Cole, the president, and other members of the society, do, immediately on sight hereof, restore and readmit the said G. Spurging, to be a member of the society;" of which said order defendants had notice. Nevertheless, they unlawfully and contemptuously neglected and*

refused to restore and readmit the said G. Spurging to be a member of the society, as by the said order they were required to do. Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the *Middlesex* sittings, after *Michaelmas* term, 1827, the order of justices set out in the indictment, was put in evidence on the part of the prosecution, and no other proof, but the recital in that order, was given that the rules and regulations of the society had been duly enrolled at the sessions, pursuant to the statute 33 G. 3, c. 54, s. 2. It was contended by the defendant's counsel, that the justices had no jurisdiction over the members of this society under the fifteenth section, (a) unless the rules had been duly enrolled, pursuant to the statute, that it lay upon those who said that the order was legal, to show the enrolment, and the recital in the order of the justices, was not evidence of that fact. Lord *Tenterden*, C. J., directed the jury to find a verdict of guilty, but reserved liberty for the defendants to move to enter a verdict of acquittal. A rule nisi having been obtained for that purpose,

Sir *James Scarlett* and *D. Pollock* now showed cause. The order is good on the face of it. It is a general rule that everything is to be presumed in favor of an order of justices. In *Rex v. Clayton*, 3 East, 58, an order of bastardy having been confirmed on appeal, and having been removed into this Court, together with the order of sessions confirming the same, the Court said it must be intended that the examination in writing of the deceased's mother had been proved before the magistrates. Here the order is undoubtedly void, unless the rules of the society were enrolled. It recites that it had appeared to the justices that the rules had been duly enrolled. That recital is, at all events, *prima facie* evidence of the fact of enrolment, for, unless they were so enrolled, the order is not valid. It must be presumed, therefore, that they were enrolled.

*Reader* and *Adolphus* contra. The burden of proving that this order was valid lay on the prosecutor. The defendants committed no offence by disobeying the order, unless it was an order warranted by law. The justices had no jurisdiction to make such an order, unless the rules of the society were duly enrolled at the sessions. The justices, by the recital in the order say, that the enrolment had been proved before them. But the assertion by them that such proof had been given, is no evidence of the fact of enrolment against the defendants. In *Rex v. Clayton*, 3 East, 58, the Court was called upon to quash an order, because it did not state in express terms that the mother had been examined on oath before the justices. But the Court, applying the rule that every intend-

(a) That section enacts, "That if any person having been admitted a member of any such society, shall think himself aggrieved by any act done or omitted by any such society, or person acting under them, it shall be lawful for two justices near unto the place where such society shall be established, upon complaint made, to issue their summons to the president, wardens, stewards, or other principal officers of such society, and also all such persons as shall appear to have the custody of the rules, &c., of such society, and such justices, upon proof on oath of such summons having been duly served, shall proceed peremptorily to hear and determine in a summary way the matter of such complaint, according to the true meaning of the rules, &c., of such society, confirmed by the justices as aforesaid, and shall make such order therein as to them shall seem just, which shall be final to all intents and purposes, and shall not be subject to appeal, nor removable into the courts at Westminster."

By the 59 G. 3, c. 128, the provisions of the 33 G. 3, c. 54, are made applicable to all societies formed under the authority of that act.

ment is to be made in favour of such an order, collected from the order itself that she was examined on oath, and refused to quash it. Here the order is undoubtedly good on the face of it; but it was incumbent on the prosecutor, who charges the defendants with an offence against the law, to show that it was a valid order, not only on the face of it, but that it was one which, by the statute, the justices had jurisdiction to make. The recital of the enrolment of the rules is no evidence of that fact against the defendants, who never concurred in, or assented to, the making of the order. It is no more than the affirmation (not upon oath), of that fact by a third party. The justices had a special authority limited to cases where the rules of the society had been enrolled. And *Rex v. Chittinston and Penhurst*, 2 Salk. 475, shows that such a special authority must be strictly pursued.

LORD TENTERDEN, C. J. According to the general rule the prosecutor was bound to establish, by legal proof, that the offence charged in the indictment had been committed by the defendants. In order to show that an offence was committed in this case, it was necessary to make out that the order was one which the magistrates had authority by law to make. They had no such authority, unless the rules of the society of which the defendants were members, had been enrolled at the sessions. That fact it was necessary to substantiate by legitimate proof. The recital in the order of justices, that the rules had been enrolled, was not, as against the defendants, legal evidence of that fact. The rule for setting aside the verdict must, therefore, be made absolute. Rule absolute.

### In re WASHBOURN.

A creditor had obtained judgment by default against his debtor, since the statute 6 G. 4, c. 16, s. 108, and the goods having been seized by the sheriff before, but not sold until after an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt.

JOHN WASHBOURN carried on the trade of a bookseller in partnership with his father, John Washbourn the elder. They having become indebted to Thomas Washbourn, executed a warrant of attorney, dated the 2d of April, 1824, authorizing certain attorneys therein named to confess a judgment by nil dicit against them for 6,200*l.*, subject to a defeazance that no execution was to be issued unless default was made in payment of the sum of 3,100*l.* to the said Thomas on the 2d of October then next. Thomas Washbourn died on the 4th of May, 1824, no part of the sum of 3,100*l.* having been paid to him. J. Washbourn and his father continued to carry on the trade of a bookseller in the city of Gloucester until January, 1828. On the 25th of that month all the stock in trade and goods of the partnership were taken possession of by the sheriffs of Gloucester, by virtue of a writ of fieri facias issued out of the King's Bench upon a judgment before then entered up on the said warrant of attorney. Whilst the goods remained in the possession of the sheriffs

unsold or undisposed of, J. Washbourn and his partner committed an act of bankruptcy; and on the 5th of February, 1828, a commission of bankrupt was awarded against them, under which they were duly declared bankrupts; and D. Mowbray and W. B. Whitaker, having been duly chosen assignees of their estate, the usual assignment was made to them. A few days before the issuing of the commission, notice was given to the under-sheriff of Gloucester that acts of bankruptcy had been committed by the partners, and that a docket had been struck; but notwithstanding such notice, the sheriffs proceeded to sell the goods so seized by them, and actually sold them on the 26th of February. The proceeds amounted to 1,080*l*. A rule nisi having been obtained, calling upon the sheriffs to show cause why they should not pay over to the assignees that sum, upon the ground that as the goods were not sold at the time when the act of bankruptcy was committed, the executor of Thomas Washbourn was a creditor, having a security within the meaning of the 6 G. 4, c. 16, s. 108, as it was construed in the case of *Wymer v. Kemble*, 6 Bar. & Cr. 479.

*Taunton* now showed cause. It is at least very doubtful whether the assignees are entitled to the proceeds of the goods sold under this execution. The goods were seized before, but not sold till after the act of bankruptcy. Before the 6 G. 4, c. 16, goods seized under a *fiery facias* were not affected by a subsequent act of bankruptcy, *Cole v. Davies*, 1 Ld. Raym. 724. The 108th section of that statute enacts, "that no creditor having security for his debt, shall receive upon any such security more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon any part of the property before his bankruptcy." Here the execution was levied by seizure upon the bankrupt's goods before the bankruptcy. It is true that there is a proviso that no creditor who shall sue out execution upon any judgment obtained by default, &c., shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with the other creditors. But it is at least doubtful whether that proviso will deprive a creditor, who has obtained judgment by default and levied by seizure, of the benefit of his execution. In the case of *Wymer v. Kemble*, 6 B. & C. 479, the goods had been seized and sold to the execution creditor, and it was held that after such sale he was not a creditor, having security for his debt within the meaning of that statute. Then, if this be doubtful, the Court will not compel the sheriff in this summary way to pay over the money to the assignees, but will leave them to bring their action. It has never been the practice for the Court so to interfere. The effect of making the rule absolute might place the sheriff in a situation of difficulty, if, after he has paid over the money to the assignees, the commission be superseded. If the Court interfere in this summary mode in this case, they may be called upon to do so by assignees in every case where judgment has been obtained after verdict. In *Taylor v. Taylor*, 5 B. & C. 392, the Court refused an application by the assignees of a bankrupt to set aside an execution issued upon a judgment obtained by *nil dicit*, and served and levied upon the property of a bankrupt before his bankruptcy.

*Campbell* contra. The true construction of the 108th section of the 6 G. 4, c. 16, is, that a creditor who obtains judgment after verdict, has a right to the goods if they are seized before the bankruptcy, but that upon judgment by default, confession, or *nil dicit*, he has no right unless the execution has been perfected by a sale. In *Wymer v. Kemble*, that was

the construction which the plaintiff's counsel contended ought to be put on the statute; and Lord *Tenterden*, in delivering his judgment, said that that was a reasonable construction. Then, if that be so, the assignees are clearly entitled to the proceeds of the sale in this case; and *Notley v. Buck*, ante, 160, is an authority to show that it was the duty of the sheriff to pay over the money to them, and the Court will compel him so to do if justice will thereby be effected. The execution creditor had an opportunity of pointing out by affidavit the objections (if there were any) to the validity of the commission. Not having stated any, it must be assumed that the commission is valid. Then, if that be so, the sheriff cannot be put to any inconvenience in consequence of this rule being made absolute. It may be beneficial to the execution creditor; for if the money be paid by the sheriff to the execution creditor, the assignees may recover it from him in an action for money had and received, and he will thereby be subjected to the costs of an action.

LORD TENTERDEN, C. J. I think that the safest course will be to discharge this rule. It is impossible to say to what extent we may be called upon to exercise a summary jurisdiction, if we were to make the present rule absolute. It is said that we ought to do so, because the judgment-creditor has not by his affidavit shown that there is any objection to the validity of the commission. There may, however, be objections to the validity of the commission, which may not now be known to him, or which, if known, it may not be prudent for him to disclose. Upon the whole, I think that this rule ought to be discharged.

Rule discharged.

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BAILEY, surviving Assignee of W. HALLIWELL, a Bankrupt, v. CULVERWELL, BROOKS, and CARROLL (a.)—p. 448.

A. and Co., as brokers for B., sold goods, then in their possession, to C., which were paid for by a bill drawn by C. and accepted by D.—C. ordered A. and Co. to keep the goods in their hands, and sell them if they could make a certain profit. Before the bill became due D. failed, and A. and Co. applied to C. for security for the bill, whereupon he gave them an order to sell the goods and apply the proceeds in payment of the bill. C. afterwards, and before the goods were sold, became bankrupt. A. and Co. handed over the goods to B. at his request, but he afterwards returned them; and after they were returned, C.'s assignees, having made a demand of the goods, brought trover: Held, that they could not maintain it; for that after the order given by C. to A. and Co. to sell the goods and apply the proceeds in payment of the bill, they remained in their hands subject to that charge, because A. and Co. must be presumed to have asked security as agents for B., whose ratification of their act for his benefit might also be inferred.

TROVER, brought by the plaintiff and Richard Emett, since deceased, as assignees of William Halliwell, a bankrupt, to recover 424 beaver skins. Plea, not guilty. At the trial, before Lord *Tenterden*, C. J., at the London sittings after Hilary term, 1827, a verdict was found for the plaintiffs for 1000*l.*, subject to the following case:—

The defendant Carroll, in December, 1823, sold a quantity of beaver skins by a contract in writing to the bankrupt, through the agency of the other defendants, Culverwell and Brooks, brokers, who had the skins in their possession, for 427*l.* 5*s.* 6*d.*, to be paid for by the bankrupt's bill.

(a) The Judges of this court sat, as on former occasions, from Friday the 27th of June to Wednesday the 2d of July inclusive; and from Monday the 27th of October to Wednesday the 5th of November inclusive, when this and the following cases were argued and determined.

on Messrs. Walducks and Hancock, payable at four months after date. The bankrupt's bill on Messrs. Walducks and Hancock was sent to the defendants Culverwell and Brooks, according to the terms of the contract, inclosing a letter, of which the following is a copy: —

"Gentlemen, — Enclosed you will find a bill accepted by Walducks and Co. for 429*l.* 13*s.* 4*d.* to balance for the beaver, and if you can obtain 2*s.* per pound profit, sell them; at present let them remain with you on that principle.

"WILLIAM HALLIWELL."

"January 14th, 1824."

This bill was immediately handed over by the defendants Culverwell and Brooks to the defendant Carroll. In consequence of the above letter, the goods remained with the brokers for sale. On the 16th of March, before the bill became due, Walducks and Co., the acceptors of the bill, stopped payment, and the defendant Culverwell in consequence thereof applied to the bankrupt for a further security, when he obtained from him the following letter: —

"Messrs. Culverwell and Brooks,

"Please to sell the beaver you hold of mine, and take the proceeds to pay my bill on Walducks and Hancock; any profit arising from it pay over to me.

Yours, &c.

"WILLIAM HALLIWELL."

"March 16."

The goods were not sold in pursuance of this letter, but remained with the defendants Culverwell and Brooks until they were delivered under an order of defendant Carroll, as after mentioned.

The bill of exchange was dishonored on arriving at maturity, and notice thereof was duly given to the bankrupt on the 17th of May; and the defendant Culverwell, when examined before the commissioners, stated, that on the said 17th day of May, they were attached at the suit of Edward Carroll, by process out of the court of the Lord Mayor of the city of London.

A commission of bankrupt issued against the bankrupt on the 4th of June, 1824, which was opened on the 11th of June, on an act of bankruptcy committed on the 21st of May preceding; and the plaintiff and one Richard Emmet (who died since the commencement of this action) were duly chosen assignees, and the usual assignment made to them by the commissioners previous to the making of the demand hereinafter mentioned. On the 14th of July, 1824, the defendant Carroll gave an order to the other defendants to deliver the skins, to a porter who brought the order, on his account, which was accordingly done. On the 5th of November, 1824, Carroll gave an order to the other defendants to receive back the skins, and such defendants, on the same day, received them again into their possession, where they remained until after the trial.

On the 15th of November, 1824, the plaintiffs caused a demand of the skins to be made upon the defendants Culverwell and Brooks, and at the same time offered to pay the charges for warehousing the same, when said defendants referred the plaintiff to their attorneys, and refused to deliver them up.

It was agreed on the trial that the skins should be sold, and they have

since been sold for 311*l.* 14*s.* The question for the opinion of the Court was, whether the plaintiff was entitled to recover; and if he was, whether the full value of the skins or nominal damages only.

*Parke* for the plaintiff. The plaintiff is entitled to recover the full value of the skins. The property was in the bankrupt Halliwell, and they remained, as his, in the hands of Culverwell and Co.; and the question is, whether, upon the facts stated in the case, the defendants or any of them have either a lien upon the skins, or a special property or equitable interest in them. It is clear that they have not. Suppose, instead of the order to sell the goods and pay Carroll out of the proceeds, the bankrupt had given an order to keep the goods for Carroll, or to hand them over to him, even that would not have given him any interest in them, nor would it have justified Culverwell and Co. in withholding them from the assignees of bankrupt. For no communication on the subject of the order had been made to Carroll, it was not procured at his request, nor did he give any credit in consequence. It would have been a mere order by the bankrupt to his agent to do a certain thing which was not in fact done; and the bankruptcy would operate as a revocation of the order. It may be likened to an order to pay money which is revocable, until it has been communicated to the creditor, and is revoked by bankruptcy. In *Scott v. Porcher*, 3 Mer. 652, it was held by the Master of the Rolls (Sir W. Grant) that a mandate by a principal to his agent accompanying certain goods consigned for sale, to pay over the proceeds to a third person, to which mandate the agent assented, gave no interest to that person until it had been communicated to him; but it was revocable by any disposition of the property inconsistent with the execution of the mandate. *Williams v. Everett*, 14 East, 582, and *Yates v. Bell*, 3 B. & A. 648, show that the same principle has been adopted in this Court. In the present case, when the bill was given by the bankrupt to Carroll, the defendants Culverwell & Co. were functi officio as to him. They held the goods on account of the bankrupt, in the same manner as if Carroll had delivered the goods into the hands of the bankrupt, and he had afterwards delivered them to Culverwell and Co. Nothing done since that time has given Carroll a right to the possession of the goods. When the bill was likely to be dishonoured, Culverwell and Co. obtained a letter from the bankrupt authorising a sale of the goods, but that was without communication with Carroll, and not as his agents. Suppose the skins had afterwards been destroyed by fire, Carroll would still have remained a creditor for the whole of his claim. [*Littledale, J.* Although Culverwell and Co. were not directed by Carroll to apply to the bankrupt for security, might he not afterwards adopt their act?] Not after the rights of third persons intervened, as was the case here by the bankruptcy. But, secondly, if the assignees are not entitled to recover the full value of the skins, still they are entitled to nominal damages. Culverwell and Co. were authorised to sell the goods, but instead of that they handed them over to Carroll, that was assuming a control which was unauthorised by Halliwell, and gave the assignees a right of action, *Solly v. Rathbone*, 2 M. & S. 298. The order was to pay the money on a contingency, viz: the sale, which had not arisen at the time of the bankruptcy. Carroll too disaffirmed the agency of Culverwell and Co. by attaching the goods in their hands.

*F. Pollock*, contra, was stopped by the Court.



BAYLEY, J. There can be no doubt but that the assignees take subject to all equitable rights attaching upon the bankrupt. The first question, therefore, is, What was the effect of the sale to the bankrupt, and of the interference of Culverwell and Co., on the 16th of March, and the letter then written by the bankrupt. If he was bound by it so as to give Carroll, if he acceded to it, a right to have the goods sold and the proceeds paid over to him, then when Halliwell became bankrupt, the goods remained in the hands of Culverwell and Co., subject to that right. When the goods were originally sold by Carroll, and placed in Culverwell's hands, the property vested in Halliwell, and Culverwell held them as his agent; and if nothing had been done by him to vary the relation in which Culverwell stood with him, the goods would have remained his, and his assignees would have been entitled to the possession of them. But on the 16th of March it was found that the bill was bad, and Culverwell made application for further security. In what character was that application made? In the first instance, acting as agent for the seller, he stipulated for a bill; when it was found that the bill would probably be unproductive, he applied for further security; that could only be in the character of a person acting for and on behalf of Carroll. It was not, indeed, by virtue of any prior authority, but there are cases innumerable establishing that the subsequent ratification of an act done by an agent relates back to the time when it was done. This was an act done for the benefit of Carroll; it was an act that could not prejudice, but might be beneficial to him; and the presumption is, that a party will adopt acts done for his benefit. Now the order by Halliwell to Culverwell to sell the goods and pay Carroll, was given on the 16th of March, and, by relation, Carroll's adoption would make it binding from that time. At that time Halliwell had power to give the order, and if the adoption is to be referred to that date, he had no longer any power to revoke. The case of *Scott v. Porcher* is altogether different. There the order was given by a principal to his agent, in that character alone: he might, therefore, at any subsequent time, control that agency. Here Culverwell and Co. were not agents for Halliwell only, but for Carroll also. It has been urged, that if after the order was given the goods had been destroyed by fire, the debt to Carroll would have remained, but that is the case with respect to every debt where goods upon which there is a lien for it are accidentally destroyed. The debt remains although the lien is lost. Has any thing been done by Carroll to reject the arrangement made between Halliwell and Culverwell? It appears that an attachment was issued by him, but what became of it is not stated. That proceeding did not necessarily repudiate the benefit of Halliwell's order. Perhaps Carroll did not then know of the order, and he may have abandoned the attachment upon being informed of the order. We now come to the question, What is the legal operation of the transaction of the 14th of July, when the skins were handed over to Carroll? If that was a conversion, the action lies for nominal damages. There is no doubt that Culverwell was to sell, and Carroll had no right to the possession of the goods. But was the delivery to him a wrongful conversion, and were not all things restored and in statu quo before the assignees of Halliwell in any way interfered? No damage was sustained by them, and I think that the mere change of possession for that interval of time worked no wrong, for which an action of trover is maintainable. For these reasons I think that Halliwell and his assignees are bound by the bargain of the 16th of March, that the delivery to Carroll

was not a good ground of action, and, consequently, that a nonsuit must be entered.

LITLEDALE, J. I am entirely of the same opinion. After the goods were sold, and the bill delivered in payment, both the property and possession were out of Carroll, and the goods were entirely at the disposal of Halliwell. Culverwell, however, applied to Halliwell for security. In what character did he do so? He sold the goods, and received the bill for Carroll, and had nothing whatever to do with it on his own account. Halliwell, upon his application, gave the letter authorizing a sale of the goods and the application of the proceeds to the payment of his debt to Carroll. It is said that as this was not communicated to him, and there was no evidence of his having ratified the act of Culverwell, he is to be treated as a stranger, and cannot avail himself of it after the bankruptcy of Halliwell. These matters certainly are not expressly stated; but if the Court, from the facts stated in the special case, can reasonably infer that there was such ratification, they may give judgment accordingly. Now it is clear that Carroll was endeavoring to secure himself as far as possible, for he made an attachment, and it is but reasonable to suppose that he would ratify any act done by Culverwell for his benefit. Then as to the second point, the facts do not show a wrongful conversion. The case differs from *Solly v. Rathbone*; there the factors of the plaintiff had handed over the goods to the defendant upon some arrangement between them, and the latter had actually sold them. Here the goods were returned by Carroll, and were in the hands of Culverwell and Co. at the time when the demand was made. The rule for entering a nonsuit must, therefore, be absolute.

Rule absolute.

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SWANN v. The Earl of FALMOUTH and JENNINGS. — p. 456.

Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession: Held, that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving any one in possession, was not an abandonment of the distress, the 11 G. 2, c. 19. s. 10, giving the landlord power to impound or otherwise secure on the premises goods distrained for rent arrear.

CASE for an excessive distress. Plea, not guilty. At the trial, before Gaselee, J., at the last Spring assizes for Cornwall, it appeared that the plaintiff was tenant to the Earl of Falmouth of a wharf called Point Quay, at the yearly rent of 150*l.*, where he carried on the business of a dealer in coals, timber, iron, and other things. On the 9th of January there was an arrear of rent amounting to 262*l.* 10*s.*, due to the earl, and on that day the other defendant (clerk to the earl's attorney) went to the plaintiff's premises and inquired of his clerk whether the plaintiff was there. He was answered in the negative, and then said, "Mr. C., Lord Falmouth's steward, is now on the quay, and intends to distrain for Lord Falmouth's rent." The steward and Jennings then walked round the wharf, upon which the plaintiff had various separate parcels of goods lying, and afterwards left the following notice of distress, signed by Jennings: "Take notice, that by virtue of a proper authority from the Earl of Falmouth, I have this day taken and distrained at Point Quay, and the cellars and premises thereunto

belonging, situate, lying, and being in the parish of Feock, in the county of Cornwall, which you now hold of him at the yearly rent of 150*l.*, the following goods and chattels, to wit, a quantity of coals now lying in heaps on Point Quay aforesaid, a quantity of slate ditto, a quantity of balk ditto. All which goods and chattels I have left on the said premises, and have distrained the same for the recovery of the sum of 262*l.* 10*s.*, due to him at Christmas last, for rent and arrears of rent of the said premises. And you are further to take notice, that unless you pay the said rent and arrears so due, together with the costs and charges of this distress, or cause the said goods and chattels to be duly replevied within five days from the delivery hereof, the same will be appraised and sold, according to law. Dated 9th January, 1827." Defendant, Jennings, and the steward then went away, and did not leave any person in possession of the goods seized, which were worth more than 1000*l.* On the 12th of January, the plaintiff requested that some handbills, which had been prepared to give notice of a sale of the distress, might not be published; this was consented to, and he afterwards paid the arrears. All the goods on the wharf having been seized, the plaintiff was prevented from carrying on his business for several days. Upon these facts, it was contended for the defendants, that the mere walking round the premises, without marking or even touching the goods, or leaving any person there to keep possession, did not amount to a seizure, and that, consequently, the action was not maintainable. The learned Judge overruled the objection, and left the case to the jury, who found a verdict for the plaintiff with 40*l.* damages. In Easter term a rule nisi for a new trial was obtained, on the grounds that no seizure was in fact proved, and that the damages were excessive: and now the Court called upon

*Follett* to support the rule on the first ground. The goods were not placed in the custody of the law by that which was done by the defendant Jennings and Lord Falmouth's steward. They merely walked round the premises, but did not touch the goods, and then went away without leaving any person in possession. The plaintiff might, therefore, have disposed of the goods at any time, and if he abstained from doing so under the mistaken notion that they were in the custody of the law, that does not give him a right of action. If by meddling with the goods he would have become liable to any legal proceeding, it must have been as for a rescous or pound breach. To the former a party is liable only where the goods are wrongfully taken out of the possession of the party distraining before they are impounded, and they must be taken out of his manual possession, *Fitz. N. B. 102, (F.), Dod v. Monger, 6 Mod. 215*, where it was held, that the distrainer having quitted possession, a retaking of the goods by the tenant was not a rescous. Then, would the plaintiff have been liable to indictment for a pound breach? That question may be considered in the same manner as if Lord Falmouth had brought an action. He certainly could not have maintained one; the mere giving of the notice, without actual seizure, would not have availed him, *Blades v. Arundale, 1 M. & S. 711*. In *Owen v. Legh, 3 B. & A. 470*, where standing corn was seized as a distress, and sold before it was ripe, the Court held, that the sale was altogether void, and, therefore, gave no right of action to the tenant. So here, if there was no valid seizure, there is no cause of action. At all events the damages were excessive, as no actual loss was proved. (Upon a suggestion from the Court, the plaintiff's counsel consented that the damages should be reduced to 20*l.*)

**BAYLEY, J.** This is not a question between the landlord and a third person, but between him and his tenant; and the points to be considered are, whether, as between them, there ever was a seizure, and whether there was such an abandonment of the distress by the landlord as could have deprived him of the right to treat the tenant as a wrong-doer, had he taken away the goods. The agents of Lord Falmouth went upon the premises for the purpose of distraining, and afterwards sent written notice of what they had been doing. That is evidence against the landlord that they had actually made a distress. Then, was the distress abandoned? If it was, no doubt the possession re-vested in the tenant. The statute 11 G. 2, c. 19, s. 10, enables the landlord to "impound, or otherwise secure upon the premises," goods that have been distrained. Then look at the notice delivered by Jennings. He says, that the goods have been distrained, and unless they are replevied, or the rent paid within five days, they will be appraised and sold. That does not indicate any intention to abandon the distress, but to leave the goods on the premises in the custody of the law. The case of *Dod v. Monger* must be considered with reference to the state of the law at the time when it occurred. The landlord, then, had no right to keep the goods on the premises. If, therefore, he quitted possession of the goods whilst they remained on the premises, that was an abandonment of the distress; but the mere leaving of the goods in a place where he has a right to keep them, without any thing to indicate an intention to abandon the distress, cannot operate as an abandonment. It would be very hard upon the tenant if this were otherwise; for then, in all cases of distress by the landlord, upon premises where a man cannot remain in possession, he must immediately remove the goods. In the present case, it could not be expected that the landlord's agent or servant should remain all night upon the wharf; and if that had been necessary in order to retain possession, the goods must have been carried elsewhere, which would have produced a very serious injury to the tenant.

**HOLROYD, J.** The tenant, by asking indulgence, recognized that which had been done as an act of seizure, and was not unlike some cases of arrest where the party submits to it without a corporal touch by the bailiff.

**LITLEDALE, J.** I am of opinion, that as between these parties there was an original seizure; and that there was not an abandonment; for since the statute 11 G. 2, the landlord may keep the goods on the premises. The case might have been different, had the question arisen between the landlord and an execution-creditor, or a purchaser for valuable consideration without notice, for the landlord might, perhaps, be considered to have lost his right as against third persons if he neglected to give reasonable notice of it. The rule for a new trial must, therefore, be discharged.

Rule discharged.

*Erskine and Coleridge* were to have opposed the rule.

**ELSMORE v. The Inhabitants of the Hundred of St. BRIAVELLS.**  
— p. 461.

A building intended for, and constructed as, a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, Held, not to be a house, outhouse, or barn within the meaning of the stat. 9 G. 1, c. 22, s. 7, so as to entitle the owner to maintain an action against the Hundred for an injury sustained by him in consequence of malicious setting fire to the same.

THIS was an action on the statute 9 G. 1, c. 22, s. 7, brought by the plaintiff to recover a satisfaction for the damage sustained by him by reason of the wilful, malicious, and felonious setting fire to his house, outhouse, or barn. Plea, not guilty. At the trial before *Parke, J.*, at the Spring assizes for the county of Gloucester, 1828, it appeared that the building of the plaintiff which had been destroyed by fire was in an unfinished state. It contained five rooms, viz., a kitchen and parlor, two rooms on the first floor, and one room over that floor; it had a stone staircase, and all the window-frames were fixed in, and one was glazed. Upon these facts it was contended, that the plaintiff could not recover, because the building was not a house, outhouse, or barn, within the meaning of the statute 9 G. 1, c. 22. The learned Judge reserved the point, and a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

*Russell, Serjt.*, in Easter term, obtained a rule nisi for that purpose. In moving for the rule he urged, that by the 9 G. 1, c. 22, s. 7, a party was entitled to recover against the hundred satisfaction for damage sustained by the setting fire to his house, barn, or outhouse, which shall be committed or done by any offender against that act. The setting fire to, therefore, must be an offence against that act. The words of that act (as far as respects the offence of burning) are, "if any person shall set fire to any house, barn, or outhouse, he shall be adjudged guilty of felony, without benefit of clergy." Now a house intended for a dwelling-house, but which has not been completed, and which has never been inhabited, is not a house within the meaning of the legislature. The statute does not alter the nature of the crime (as it existed before), or make any new offence, but excludes the principal from clergy more clearly than he was before, *North's case*, 2 East, P. C. 1021; *Breeme's case*, 2 East, P. C. 1022. Then would the maliciously and voluntarily burning of a house intended to be inhabited, but which has never been inhabited, be an offence at common law, with respect to which arson may be committed. Lord *Hale*, in his Pleas of the Crown, tit. Arson, c. 49, p. 567, speaking of the word *house*, says, "This extendeth, not only to the *very dwelling-house*, but to all outhouses which are parcel thereof, though not contiguous to it, nor under the same roof as in the *case of burglary*." This is an authority to show that at common law the offence of maliciously and voluntarily burning a house could only be committed with respect to such mansions in which burglary might have been committed. *Rez v. Donovan*, 1 Leach, C. L. 81, 8d edit., and *Rez v. Winter*, R. & R. Cr. Ca. 295, show that cases on this statute have always been considered with reference to the acknowledged definition and description of a house or outhouse in burglary. Now *Rez v. Lyons*, 2 East, P. C. 497, *Rez v. Thompson*, 1 Leach, C. L. 222, n., and *Rez v. Fuller*, 2 Leach, C. L. 398, establish clearly that the offence of burglary could not have been committed in respect of a house intended to be inhabited, but which had not been inhabited. Secondly, this is not an outhouse, because it is not parcel of a dwelling-house. *Hiles v. The Hundred of Shrewsbury*, 3 East, 457, which was an action against the hundred for damage sustained by the maliciously setting on fire of an outhouse, shows that the building burnt must be proved to have been in some degree connected with the dwelling-house to make it parcel thereof, and that it must be such an outhouse in respect of which arson may be committed at common law. Thirdly, this was not a barn in the ordinary acceptation of that term.

It was not intended to be used for the purpose for which a barn is used, nor was it constructed in that mode in which a barn is usually constructed.

*Talfourd* now showed cause. It must be conceded, that the building was not a house or outhouse within the meaning of the statute; for it must undoubtedly be a house or outhouse in respect of which burglary may have been committed. The authorities establish that, a house built for the purpose of being used as a dwelling-house, but which has never been used as such, is not a house in respect of which burglary can be committed. In *Fuller's case*, the house was a new one, and finished all but the painting and glazing; a workman, who was employed by the owner, slept in it for the purpose of protecting it; but no part of the owner's family or servants had yet taken possession of it. This was ruled not to be a dwelling-house. But the decision shows that it is not the intended purpose for which a house is built, or the mode of its construction, which makes it a dwelling-house, but the fact of its being inhabited. Now, to apply that principle to this case, the building was intended to be a dwelling-house, but it had been applied to those purposes to which a barn is usually applied. As the actual user of a building for inhabitation in one instance makes it a dwelling-house, so the user of this building, for the purpose of depositing in it hay and straw (which is the purpose for which a barn is used), makes this a barn.

*Russell*, Serjt., contra. This building clearly was not a barn within the usual meaning of that term. *Rez v. Judd*, 2 T. R. 255, shows that the matter in respect of which the offence is committed, must come within the ordinary and established meaning of the words used in the statute. There the defendant had been committed for setting fire to a parcel of *unthrashed* wheat; and the Court were of opinion, that as the statute had only made it felony to set fire to a *cock, mow, or stack* of corn, the warrant did not charge the defendant with a felony, and he was therefore admitted to bail. The building in the present case was not a barn in the ordinary meaning of that word; at most it was a house used as a barn. The question in this case is precisely the same as that which would have been raised upon an indictment against a party for setting fire to this building, viz., whether he was guilty of a capital offence. The statute, being highly penal, must be construed strictly, and *Hale's P. C. c. 49, p. 59, Rez v. Donnavan, 1 Leach. C. C. 81, and Rez v. Winter, 1 Russ. & R. 295*, show that the statute has been so construed.

*Cur. adv. vult.*

BAYLEY, J. This was an action against the inhabitants of the hundred on the 9 G. 1, c. 22, brought to recover a satisfaction for the damage sustained by the setting fire to a house, outhouse or barn. The question is, whether the building which was set fire to comes within the description of a house, outhouse, or barn. It appeared to have been built for the purpose of being used as a dwelling-house, but it was in an unfinished state, and never was inhabited. It was conceded in argument, that it was not a house within the meaning of the statute 9 G. 1, c. 22. It has been decided that that statute does not alter the nature of the crime, or make any new offence, but merely excludes the principal from clergy more clearly than he was before. There cannot be any doubt that the building in this case was not a house in respect of which burglary or arson could be committed. It was a house intended for residence, but it was not inhabited. It was not, therefore, a dwelling-house, though it was intended to be one. It was not an outhouse, because it was not parcel of a dwelling-house. But it was contended that it was a barn, because it had been

used for those purposes for which a barn is used. The building had three stories, chimneys, a staircase, and windows. The plaintiff had deposited in it a quantity of straw and agricultural implements. On consideration, we are of opinion, that this building was not a barn within the meaning of that word, as it is used in this statute. It was a house applied to those purposes to which a barn might be applied. The act of the 9 G. 1, c. 22, though remedial in some respects, is in others capitally penal. The hundred are liable to make satisfaction to the party injured by the burning of a house, outhouse, or barn, provided a capital offence be committed against that statute by such burning. The statute, therefore, with reference to a case like the present, must be construed strictly; and, so construing it, we are of opinion, that the building consumed by fire in this case was not a house, outhouse, or barn within the meaning of this act of parliament: and in this opinion Lord *Tenterden*, with whom we have conferred upon this case, concurs. The rule for entering a nonsuit, must, therefore, be made absolute. Rule absolute.

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The KING v. The Inhabitants of HIPSWELL.—p. 466.

The statute 28 G. 3, c. 48, s. 4, makes void all indentures whereby children under eight years of age are bound apprentices to chimney-sweepers, and no settlement can be gained by serving under them.

UPON an appeal against an order of two justices, whereby Elizabeth Miller, widow, and her four children were removed from the township of Morpeth, in the county of Northumberland, to the township of Hipswell, in the parish of Catterick, in the county of York; the sessions confirmed the order, subject to the opinion of this Court on the following case:—The pauper's husband, Joseph Miller, the son of Jane Salkeld, the wife of Thomas Salkeld, was, *at the age of five years*, bound by the said Thomas Salkeld, by the name of Joseph Salkeld, an apprentice to William Wright, a chimney-sweeper, under the following indenture: "This indenture, made the 21st day of May, in the forty-fourth year of the reign of our sovereign lord George the Third, &c., between Thomas Salkeld, of Alston Moor, in the county of Cumberland, yeoman, and Joseph Salkeld, his son, of the one part, and William Wright, of the township of Hipswell, chimney-sweeper, of the other part; witnesseth that the said Joseph Salkeld hath of his own free will, and with the consent of his said father, put and bound himself apprentice to and with the said William Wright, and with him, after the manner of an apprentice, to dwell, remain, and serve from the day of the date hereof, for, during, and until the term of seven years thence next following be fully completed and ended; during all which term the said apprentice his said master well and faithfully shall serve, his secrets shall keep, &c., in the usual form. And the said William Wright, the master, in consideration of such service so to be done and performed, doth for himself, his executors, &c., covenant, promise, and grant by these presents, to and with the said Joseph Salkeld, the apprentice, that he the said William Wright, his executors, &c., shall and will teach, learn, and inform him, the said apprentice, or cause him to be taught, learned, and informed in the art, trade, or mystery of a chimney-sweeper, which the said master now useth, after the best manner of knowledge that he or they may or can, with all circumstances thereunto belonging. And also shall find and provide to and for the said apprentice

sufficient and enough of meat, drink, washing, lodging, and clothes, fit and convenient for such an apprentice. In case of the master's death within the said term, the apprentice is to be at liberty, and choose a master for himself. And for the true performance of all and singular the covenants and agreements aforesaid, each of the parties aforesaid doth bind himself unto the other firmly by these presents. In witness whereof, the parties above named to these present indentures interchangeably have set their hands and seals the day and year above written." The pauper's husband, Joseph Miller, so bound by the said indenture under the name of Joseph Salkeld, served under it as an apprentice to the said William Wright, during the time specified in the same indenture, in the township of Hipswell, where he resided during the same period. And the court of quarter sessions was of opinion that he thereby gained a settlement in that township.

*Patteson* in support of the order of sessions. The question is, whether the binding of the pauper's husband was made void by the 28 G. 3, c. 48. The first section of that statute clearly applies to parish apprentices alone, it prescribes a form for the indenture, and then says, that compulsory bindings in that form shall be as valid as voluntary bindings by the parties themselves. The second and third sections refer to the bindings mentioned in the first. [*Bayley, J.* The form of an indenture given in the schedule is applicable to bindings by the parents as well as by parish officers.] That is so, but it does not vary the effect of the first section. The fourth section will probably be relied on for the appellants. It enacts, "that all indentures, covenants, promises, and bargains hereafter to be made or taken, of or for the having, taking, employing, retaining, or keeping of any boy or boys as or in the nature of an apprentice or apprentices, or servant or servants employed in the capacity of a climbing-boy or chimney-sweeper, who shall be under the age of eight years as aforesaid, *than is* by this act limited, ordained, and appointed, shall be absolutely void in the law to all intents and purposes." That, as it is printed, is unintelligible, probably the word "otherwise" ought to be inserted before *than*; but still it must be construed with reference to the first section, which applies to parish apprentices only, for various parts of the statute contemplate other bindings as valid besides those specified. [*Bayley, J.* What is the title of the act?] "An act for the better regulation of chimney-sweepers and their apprentices," certainly general in its terms, and some parts of the act apply to all apprentices to sweeps. Thus, section 6 gives a general power to justices to hear and determine complaints between the masters and apprentices. Supposing this binding not to be within the statute, it cannot be objected to on the ground that the apprentice was only five years old at the time of the binding. There is not any authority upon this subject, but in *Bro. Abr. Labourers*, pl. 46, it appears to have been considered that five years of age was the limit below which children could not be employed as servants. But supposing the statute does apply, still the indenture was not void, but voidable only, *Rex v. St. Nicholas, Ipswich*, Burr. S. C. 91, and the service having been performed under it, a settlement was gained.

*Alderson*, contra, was stopped by the Court.

*BAYLEY, J.* The title of the stat. 28 G. 3, c. 48, is general, "For the better regulation of chimney-sweepers and their apprentices," and the recital is, "That the laws in being respecting masters and apprentices are not sufficient to prevent the complicated miseries to which boys employed in climbing and cleansing chimneys are liable." Then the first section



gives the parish officers power to bind under certain circumstances. The second section contains a regulation applicable to parish apprentices. The third enacts, that a particular form of indenture shall be adopted, and this form is equally applicable, whether the binding is by the parish officers or the parents of the child. It is not, however, necessary to decide whether those clauses apply to all bindings, because the fourth and some other sections clearly extend to cases of bindings by parish officers or parents, and reach all bindings or bargains of apprenticeship or service. The fourth section begins by enacting, that all indentures, &c., for binding any boy under eight years of age as an apprentice to a chimney-sweeper, "than is by this act limited," shall be void in the law to all intents and purposes. The words "than is by this act limited," are not sensible; but it is manifest that the legislature intended to make all indentures void where the child bound to a chimney-sweeper is under eight years of age. If there were any doubt upon this, it would be removed by the latter part of the clause, the meaning of which is perfectly clear: "That every person who shall from henceforth have, take, employ, retain, or keep any such boy as or in the nature of an apprentice or servant, employed in the capacity of a climbing boy or chimney-sweeper as aforesaid, who shall be under the age of eight years as aforesaid contrary to the tenor and true meaning of this act, and being convicted thereof as hereinafter mentioned, shall forfeit and pay for every such apprentice or servant so by him or her had, taken, &c., any sum not exceeding 10*l.*, nor less than 5*l.*" But it is said that *void* is sometimes construed *voidable*, and where the provision is introduced for the benefit of the parties only, such a construction may be right, but where it is introduced for public purposes, and to protect those who are incapable of protecting themselves, it should receive its full force and effect. Here I think it would be contrary to the spirit of the act to consider the indenture voidable only. The consequence is, that no settlement was gained under it.

LITLEDALÉ, J., concurred.

Order of sessions quashed.

### CORNISH and Another v. JOHN SEARELL. — p. 471.

A. being tenant of premises under an indenture of lease granted by B., a sequestration issued out of the Court of Chancery against the latter. A. then signed the following instrument: — "I hereby attorn, and become the tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon:" Held, that this was an agreement to become tenant, and required a stamp: Held, secondly, that the defendant, not having received possession of the premises from C. and D., might dispute their title, and that the lease not being proved to have been surrendered, was an answer to the action.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial, before *Littledale, J.*, at the Spring assizes for the county of Cornwall, 1828, the plaintiffs, in order to prove that the defendant held the premises as tenant to them, put in the following document, signed by the defendant, and bearing date the 31st of January, 1826, as an acknowledgment by him of that fact: "I do hereby attorn, and become the tenant of a certain estate and premises called Goulds, and also of certain closes of land, and orchard, and premises, called Cleave and Westaway, situate in Staverton, in the county of Devon, to James Cornish and Frederick Angel, two of the sequestrators named in a certain writ of sequestration issued in a certain cause now pending in the Court of Chancery, between Richard Marshall, George Drake, and Allen Browne,

plaintiffs, and Allen Searrell, defendant, and to hold the same for such time, and on such conditions, as may be subsequently agreed on between me and the sequestrators aforesaid." It was objected by the defendant's counsel that this document amounted to an agreement, and required a stamp; and even assuming that it was a mere acknowledgment by the defendant that he had become tenant to the plaintiffs, they, as sequestrators having no legal estate in the premises, could not maintain this action. The learned Judge reserved the point. The plaintiffs then called a witness, who stated that he, on the part of the plaintiffs, had, in May, 1826, applied to the defendant for payment of rent, but the latter refused to pay, and in fact never had paid rent to the plaintiffs. The defendant then put in an indenture of lease, dated in June, 1816, whereby Allen Searrell, the father of the defendant, demised to him the premises in question for twenty-one years, at the rent of 20*l.*, and contended, that as he held under this lease, and had never surrendered it by deed, or by act and operation of law, he still continued to hold under it, and, therefore, that he was liable not to the plaintiffs, but to the lessor for rent. The plaintiffs objected that the defendant, having attorned, could not dispute their title. To that it was answered, that that was the rule where the tenant attorned to a person deriving title from the original landlord. Here the plaintiffs were strangers, and had no legal title to the land, or to receive the rent. The jury found for the plaintiffs, and that there was *no application for rent in May, 1826*. A rule nisi for entering a nonsuit having been obtained by *Wilde, Serjt.*, in last Easter term,

*Merewether, Serjt.*, and *R. Bayly* now showed cause. The instrument in question was a mere acknowledgment of a tenancy subsisting between the defendant and the plaintiffs, and not an agreement. Even if it was an agreement, it was only used to prove an admission of a tenancy, and not as an agreement. It is clear that for collateral purposes an unstamped instrument may be used: *Gray v. Smith*, 1 Campb. 387; *Watkins v. Hewlett*, 1 Brod. & B. 1. In *Drant v. Brown*, 3 B. & C. 665, a proposal in writing to let land was accepted by parol: it was held that the proposal itself was admissible in evidence without a stamp. So here the attornment may be considered as a mere proposal by the tenant to take the land, which was afterwards accepted by parol by the plaintiffs. And although the jury have found that there was *no application for rent in May, 1826*, the bringing of this action was evidence to show that the plaintiffs accepted the proposal. Then, as to the lease, there was evidence to show that at the time when the defendant attorned, the lease was not a subsisting lease, for the defendant undertook by this instrument to hold the premises for such term and upon such conditions as the plaintiffs and he might thereafter agree upon. It must, therefore, be presumed that the lease had been surrendered by act and operation of law.

BAYLEY, J. I think that the plaintiffs are not entitled to recover. On the 1st of January, 1826, the defendant held the premises in question under a lease granted by his father, Allen Searrell, against whom a sequestration issued out of Chancery. The plaintiffs were the sequestrators. The defendant, at the time when this action was brought, must have continued to hold under that lease, unless it had been put an end to by actual surrender by deed, or by act and operation of law. Unless there was evidence to show that that lease had been surrendered or put an end to, he was liable by law to pay the rent to the lessor according to the covenants in the lease. On the 31st of January, 1826, the defendant

signed the instrument, which, it is contended, is an attornment; but which appears to be an agreement or bargain, in distinct terms, between the plaintiffs and the defendant, that the latter should become the tenant to the plaintiffs as sequestrators; and if it be an agreement, then it clearly required a stamp. By the latter part of the instrument, it is stipulated that the defendant shall hold for such time, and on such conditions, as the parties may subsequently agree upon. It has been insisted, that that stipulation was evidence to go to the jury, that the lease was not at that time a subsisting lease. I think that that at most was only evidence to show that the lease might thereafter have been put an end to, not that it was already determined. The tenant may have intended to continue to hold under the lease, if the sequestrators offered him terms less beneficial to him than those contained in the lease, but to surrender it if they offered him better terms. I think, therefore, that as it was not proved that the lease had been surrendered at the time when the instrument (which is said to be an attornment) was signed, it was an answer to the action. But even if there were no lease, I should have great difficulty in saying that the plaintiffs were entitled to maintain this action. The instrument describes the character of the persons to whom the defendant was to become tenant; they are stated to be two of the sequestrators. As sequestrators they have no legal right to receive the rents. It has been said, that the defendant, having agreed to become tenant to the plaintiffs, cannot dispute their title. If the defendant had received possession from them, he could not have disputed their title. In *Rogers v. Pitcher*, 6 Taunt. 202, and *Gravener v. Woodhouse*, 1 Bingh. 38, the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned, by mistake, to one who has no title. In the former case the tenant cannot (except under very special circumstances) dispute the title; in the latter he may. In this case the defendant agreed to become tenant to the plaintiffs as sequestrators. They may have an equitable title to the rent, but not a legal one. And as it appears on the face of the instrument, which the plaintiffs rely upon in support of their claim, that they have no legal right to receive the rent, I incline to think that, independently of the lease, they could not recover in this action. It is unnecessary, however, to decide the case on that ground. I am of opinion, first, that the instrument was not admissible in evidence for want of a stamp; and, secondly, that as there is no ground for inferring that the lease was put an end to, it was a subsisting lease, and that being so, the father of the defendant was entitled at law to receive the rent. The rule for entering a nonsuit must, therefore, be made absolute.

HOLROYD, J. I think this action cannot be supported. Where the original landlord parts with his estate, and transfers it to another, and the tenant consents to hold of that other, the tenant is said to attorn to the new landlord. The attornment is the act of the tenant's putting one person in the place of another as his landlord. The tenant who has attorned, continues to hold upon the same terms as he held of his former landlord. But here the agreement is for a new tenancy, and is for a time, and upon conditions which may vary from those in the former lease, according to the agreement of the parties. I think, therefore, that this instrument was an agreement, and not a mere attornment, and required a stamp. The plaintiffs are described, in the paper which they have given in evidence, as sequestrators. As such they have no legal estate. I doubt, therefore, whether, independently of the lease, they

could recover for the occupation of the premises by the defendant. In *Frontin v. Small*, Ld. Raym, 1418, a person was empowered by warrant of attorney to execute a deed for another; and it was held, that a lease importing to be made by the lessor, as attorney for another, was void upon the face of it. The former lease is at all events an answer to the action. There was no evidence to raise any inference that it had been surrendered to the original lessor, and the plaintiffs as sequestrators could not accept a surrender. There seems to me to be a want of consideration for the defendant's agreement to give up the term he had under that lease.

LITTLEDALE, J. I think the document ought to have been stamped. It contained an agreement that the defendant should become tenant to the plaintiffs, who had no legal estate in the premises. That is not an attornment. I think, also, the lease would prevent the plaintiffs from recovering in this action. The defendant, by setting up the lease, does not dispute the title of the person by whom he was let into possession, or of any person claiming under him. Besides, by the agreement, the defendant does not recognize the title of the plaintiffs as individuals, but as sequestrators. In that character they can have no legal title to the rent; at all events, the lease being an existing lease, was an answer to the action, inasmuch as it thereby appeared that the title to receive the rent was in a third person.

Rule absolute.

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PHILLIPS v. ALLAN. — p. 477.

A discharge of an insolvent debtor upon a *cessio bonorum* by the court of session in Scotland, is no answer to an action brought by an English subject in a court in this country to recover a debt contracted in England, although it appeared that the plaintiff opposed the discharge of the defendant in the Scotch court.

Semble, That it would have been an answer to the action if the plaintiff had claimed to have the benefit of the Scotch law, and to take a distributive share of the property of the insolvent.

DECLARATION by the plaintiff, as drawer, against the defendant, as acceptor of a bill of exchange for 103*l.*, dated London, 17th day of December, 1821, payable two months after date. Plea, that after the accruing of the several causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on the fourth of July, 1826, the defendant was a prisoner for debt, at the suit of one John Sim, in a certain prison called the Tolbooth of Canongate, in that part of the United Kingdom called Scotland, to wit, at, &c.; and being so in prison he, defendant, afterwards, to wit, on, &c., at, &c., did present unto the Lords of his Majesty's council and session of that part of the United Kingdom called Scotland, a written petition, setting forth that on the 20th of May, 1826, he, the defendant, was incarcerated in the Tolbooth, by virtue of letters of caption, raised at the instance of Sim, and that he, defendant, was thereafter arrested in the Tolbooth, by virtue of letters of caption at the instance of certain other persons therein named, and that he was continually oppressed, and in danger of being arrested at the instance of other persons thereafter named, his real or pretended creditors, (naming, among others, the plaintiff,) and also that the inability of him, defendant, to pay his debts, was not occasioned by any fraud in him, but was owing to misfortunes and losses sustained by him, as would, if required, be particularly condescended in the course of that process, and although he had offered to convey his whole effects to his said creditors, yet they refused to accept

thereof, or consent to his being set at liberty ; and therefore, that it ought and should be found and declared, by decree of the Lords of council and session, that the inability of him, defendant, to pay his debts was not owing to fraud, but to misfortunes, and that it being so found and declared, he, defendant, should be ordained to be set at liberty from the said prison, upon his granting a disposition omnium bonorum upon oath in favor of his creditors in such form as the Lords should direct, and all judges, &c., of his Majesty's law should be discharged from putting any diligence into execution against him, and from troubling, molesting, or incarcerating him in time coming for payment of any debts due by him to the persons named in the petition, and others ; and that the said Lords of Council and session ought to dispense with his, the defendant's wearing the habit directed to be worn by bankrupts, by any law or practice, or otherwise, after the form and tenor of the laws and daily practice of Scotland used and observed in the like cases in all points ; whereupon afterwards, to wit, on, &c., according to the practice of the court of the Lords of council, &c., it was ordered that notice should be given to the creditors named in the petition, and, among others, to the plaintiff, to compare before the Lords, &c., at Edinburgh, or wherever, &c., the 20th of June, 1826, to answer at the instance of the defendant, in respect of the matters contained in the petition. Averment, that on, &c., notice was given to the creditors named in the petition, and among others to the plaintiff, to compare as aforesaid, whereupon afterwards, to wit, on, &c., at, &c., the subject-matter of the petition was heard before the Lords, &c., and certain creditors of defendant (and among others the plaintiff) appeared by counsel, and were heard in opposition to the defendant in respect of the petition, whereupon it was afterwards adjudged in the said Court that the Lords, &c., found the defendant entitled to the benefit of the process aforesaid, upon lodging in process a disposition of his effects, and also upon making oath in the terms of the acts of sederunt, whereupon defendant, afterwards, to wit, on, &c., lodged in process a disposition of his effects, and also made oath, in terms of the acts of sederunt, and thereupon became entitled to be discharged, and was then discharged out of custody. Averment, that from the time of the imprisonment to the time of the discharge from custody, the plaintiff had no cause of action or demand whatsoever against the defendant, except the causes of action in the declaration mentioned ; that afterwards certain funds, goods, and chattels of defendant, of the value of 100*l.*, became available, and might have been recovered under the said disposition for the benefit of the creditors of defendant, and for the benefit, among others, of the plaintiff ; that all and singular the proceedings aforesaid were pursuant to, and in conformity with, the laws of Scotland aforesaid, and that, according to those laws, the said Lords, &c., were competent to act as aforesaid in the premises, &c., whereby, and by the effect of the aforesaid laws, he, the defendant, had become absolutely discharged, in respect of his person, lands, goods, and chattels from the several causes of action aforesaid, and this, &c. Replication, that the causes of action mentioned in the declaration severally accrued to the plaintiff within the kingdom of England, and this, &c. Demurrer and joinder.

*Barstow* in support of the demurrer. Assuming that the court of session in Scotland is to be considered a foreign court, it had jurisdiction to adjudicate upon this debt ; and having adjudicated upon it, its judgment is binding on the plaintiff, who was a creditor of the defendant, and

appeared before that court to oppose his discharge. *Smith v. Buchanan*, 1 East, 6, will be relied upon by the other side. There it was decided that a discharge under a commission of bankrupt in a foreign country was no bar to an action against the bankrupts for a debt arising here by a creditor, a subject of this country. But in that case the creditor had not taken the benefit of the commission, or done any act to show that he had assented to the discharge given to the debtors. It appeared in that case that the defendants had been discharged from their debts by the provisions of a certain law of the state of Maryland, on condition of their having relinquished all their property to their creditors. The judgment of Lord *Kenyon* proceeded mainly on the ground that the English subject could not be bound by a condition to which he had given no assent, express or implied. Here the plea states that the plaintiff appeared before the Scotch court, and was heard in opposition to the defendant in respect of the petition. His appearance in that court shows that he consented to become bound by its judgment, pronounced according to the law of Scotland; and that judgment having been that the defendant should be set at liberty, upon his satisfying the condition required by the law of Scotland, viz., making the *cessio bonorum*, the plaintiff is bound by that judgment, and the plea is an answer to the action.

*Alderson*, contra, was stopped by the Court.

BAYLEY, J. It has been very properly conceded that a discharge in a foreign country will not of necessity preclude an English creditor from suing in an English court, in respect of a debt contracted in England. It has been decided that a certificate under a commission of bankruptcy, issued in Ireland, since the Union, does not discharge a debt contracted in England, *Lewis v. Owen*, 4 B. & A. 654. But a discharge of a debt pursuant to the provision of an act of parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, and to bind the rights of all persons residing either in England or Scotland, and which purports to bind subjects in England and Scotland, operates as a discharge in both countries. In *Sidaway v. Hay*, 3 B. & C. 12, this Court decided upon that principle that a debt contracted by a trader residing in Scotland was barred in this country by a discharge under a sequestration issued in conformity to the statute 54 G. 3, c. 157. The defendant in this case was not discharged pursuant to the provisions of that act of parliament. He was discharged on making a *cessio bonorum*, which, by the law of Scotland, operates as a discharge of the person in respect of debts contracted in Scotland. The court of session in Scotland, *prima facie*, is competent only to bind Scotch subjects, and to adjudicate in respect of debts contracted in Scotland. The plaintiff is an English subject, and sues in respect of a debt contracted in England. *Prima facie*, therefore, he is not bound by the judgment of a court in Scotland. But it is insisted that he has sought relief from the Scotch court; that he therefore, by implication, consented to be bound by the law of Scotland, and, consequently, that he is barred by the judgment of that court, pronounced according to that law. But I think it does not appear upon this record that the plaintiff did seek relief from the Scotch court. The plea states that the defendant, being incarcerated in the Tolbooth, presented to the Lords of session a petition, stating that the plaintiff, among others, was one of his creditors, and that the defendant had offered to convey his effects to his creditors, and that they (including the plaintiff) had refused to accept such conveyance; and then the prayer was, that he, the defendant, should be set at liberty upon his granting

a disposition of all his goods in favor of his creditors, and that in future he should not be incarcerated or troubled for payment of any debts due to the persons named in the petition. The object of the petition, therefore, was, that he should be free from restraint in Scotland in respect of those debts. The plea then states, that it was ordered that notice should be given to the creditors named in the petition, and, among others, to the plaintiff, to compare. The object of that notice was that the creditors should have an opportunity of showing cause why the prayer of the petitioner should not be granted. It then avers that notice was given to the creditors, and, among others, to the plaintiff; that the subject-matter of the petition was heard, that the plaintiff appeared by counsel, and was heard in opposition to the defendant in respect of the petition. It has been insisted that the fact of the plaintiff's having appeared in the Scotch court, and there opposed the granting of the prayer of the petition, distinguishes this case from that of *Smith v. Buchanan*, 1 East, 6; but I think it does not. The plea does not show that the plaintiff desired to take a distributive share of the defendant's property (which he might have had by the law of Scotland,) but only that he endeavored to prevent the defendant's being free from restraint in Scotland in respect of his debt. One part of the prayer of the petition was that all judges and law officers might be restrained from molesting the defendant in respect of his debts. But for that provision, the plaintiff might have sued the defendant in the Scotch courts in respect of the debt owing to him. By opposing the defendant, he only showed that he did not wish to be deprived of the liberty of suing him in the Scotch courts. He may have insisted in that court that the defendant was a fraudulent debtor. There was no consent, therefore, of the plaintiff to be bound by the judgment of the Scotch court. If he had asked to have the benefit of the Scotch law, and to receive a share of the defendant's property, there might have been ground for saying that he had consented to become bound by that law and by the judgment of the Scotch court. It seems to me that the debt is a subsisting debt, and that the plaintiff, an English creditor, is not prevented from enforcing payment of it in an English court of justice.

HOLROYD, J. This case falls clearly within the principle of the decision in *Smith v. Buchanan*, unless it be distinguishable from that case on the ground that the plaintiff appeared in the court in Scotland, and opposed the discharge of the defendant. By the law of Scotland the defendant was entitled to be discharged from custody in respect of this debt, on condition of making a *cessio bonorum*. The plaintiff is an English subject, suing for a debt contracted in this country, and is not bound by the Scotch law. It is said that he has consented to be bound by the Scotch law by reason of his having appeared in the court in Scotland, and opposed the defendant's being discharged out of custody. But I think his having appeared in that court makes no difference in this case. If he had asked relief from the Scotch court, and sought to have the benefit of the law of Scotland by taking a share of the defendant's property, that might have made a difference. He may have appeared in the Scotch court for the purpose of objecting to the jurisdiction; and if so, it is quite clear he may now insist that their judgment is a nullity, in the same manner as a party, who has appeared in the spiritual court, may insist that the judgment of that court is void.

LITLEDAL, J. I am of the same opinion. It is admitted that the plea could not be supported, unless it alleged that the plaintiff appeared

in the court in Scotland ; but I think that does not make any difference. If the plea had alleged that the plaintiff sought to avail himself of the law of Scotland, by taking a distributive share of the defendant's estate, the case then might have been different. But here the allegation is, that the plaintiff appeared by his counsel, and was heard in opposition to the defendant, in respect of the petition. He may have opposed the prayer of the petition on the ground that the Scotch court had no jurisdiction, or that the defendant was not a person entitled, by the law of Scotland, to be discharged on making a *cessio bonorum*. The ground, however, on which the plaintiff opposed the defendant is wholly immaterial, unless he sought relief by availing himself of the Scotch law to obtain a distributive share of the defendant's property. The judgment of the Court must be for the plaintiff. Judgment for the plaintiff.

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PAUL and Others v. ELIZABETH NURSE and EDMUND NURSE. —p. 486.

Covenant against the assignee of the lessee for non-payment of rent. Plea, that before the rent became due, the defendants assigned all their estate and interest in the demised premises to A. B. Replication, that in and by the indenture, the lessee for himself, his executors, administrators, and assigns, covenanted that he, his executors, or administrators should not assign the premises thereby demised without the consent of the lessor, and that no consent was given : Held, upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign did not estop the assignee from setting up the assignment ; and, secondly, that the action being founded on privity of estate, the liability of the defendant ceased as soon as the privity of estate was destroyed.

DECLARATION stated that one R. Cheatle, deceased, before the time of making the indenture thereafter mentioned, was seised in his demesne as of fee of the tenements with the appurtenants thereafter mentioned to have been demised, to wit, at, &c. ; and being so seised on the 30th of April, 1816, at, &c., by a certain indenture then made between Cheatle of the one part, and one Copeland of the other part, Cheatle, for the considerations therein mentioned, granted and demised to Copeland certain premises, with the appurtenants. Habendum from the 11th October, 1815, for the term of twenty-one years, at a rent of 80*l.*, payable half-yearly. Covenants by Copeland, for payment of rent. Averment, that all the estate, right, title, and interest of Copeland, by assignment vested in the defendants, whereby they, as assignees as aforesaid, then entered upon the demised premises, with the appurtenants, and became and still were possessed thereof, for the residue of the term ; that being so possessed, and the reversion belonging to Cheatle, he, on the 27th March, 1823, by will, devised the reversion to the plaintiffs, their heirs, &c., and died on the 8th September, 1826. Breach, non-payment of half a year's rent, due the 11th October, 1827. Plea, that, before the rent became due, the defendants assigned all their estate, right, title, and interest in the demised premises to Edmund Nurse, the elder. Replication, that in and by the indenture of lease Copeland for himself, his executors, administrators, and assigns covenanted that he, Copeland, his executors, or administrators should not assign, underlease, dispose of, or grant any part of the premises thereby demised, to any



person, without the consent of Cheatle, his heirs, or assigns; that neither Cheatle, in his lifetime, nor the plaintiffs, since his death, had given any such consent. General demurrer.

*Kelly* for the plaintiffs. The question raised by the demurrer to the replication is, Whether a covenant by the lessee, his executors, administrators, and assigns, not to assign, continues in force after the lessor has once given a license to assign? and, if it does, Whether the assignment pleaded by the defendants is not void? If the lease had contained a proviso for re-entry for breach of such a covenant, and an ejectment had been brought, the license to assign would have been an answer to the action, because the condition would thereby have been destroyed. In *Dunpor's case*, 4 Coke, 119, it was held, that the alienation by license to the assignee determined the condition, so that no alienation afterwards made by him could be a breach of the proviso, or give the lessor a right of entry, for the lessors could not dispense with an alienation for one time, and insist that the same estate should remain subject to the proviso after. The reasons given in that case apply to a condition, and not to a covenant. Besides, this rule of law should not be extended, *Doe d. Boscawen v. Bliss*, 4 Taunt. 735. The question in this case must be considered as if the cases upon conditions had never been decided. The covenant must be construed according to the intention of the parties. The object of such a covenant is to secure to the landlord a responsible tenant. That intention will be best effectuated by holding that such a covenant will continue in force, so as to have the effect of preventing the tenant at all times from assigning, without the license of the lessor. [*Holroyd, J.* The general principle is, that a lessee may assign his interest in the term. But the lessor may restrain the lessee from assigning by proviso or covenant; and if he grants the term, subject to a condition that it shall cease if the lessee assigns, an assignment by the lessee will be void. But if the lessor, as in this case, restrain the lessee from assigning by covenant only, the latter by assigning commits a breach of covenant, but the assignment itself is not void.] Assuming that the assignment is not absolutely void; still as between the plaintiffs and defendants, the latter are estopped from setting up their own breach of covenant as an answer to the action, on the principle that no man can take advantage of his own wrong. [*Holroyd, J.* If the obligation to perform such a covenant arises from the privity of estate that obligation will cease when the privity of estate is destroyed; and if, in point of law, the interest which the defendants had in the land is divested out of them, they may, in answer to this action, which is founded on privity of estate, plead that their estate and interest has ceased.]

*BAYLEY, J.* This action being founded on privity of estate, the obligation of the defendants to perform the covenant arose only from their filling the particular character of assignees of the estate, which the lessee had under the lease. As soon, therefore, as they ceased to be assignees, their obligation to perform the covenant was at an end. The plaintiffs' remedy is by an action on the covenant not to assign. Besides, it may admit of some doubt whether the defendant is within the covenant; for the lessee only covenants that he, his executors or administrators, will not assign. The judgment of the Court must be for the defendant.

Judgment for the defendant. (a)

(a) See *Doe, dem. Chure, v. Smith*, 5 Taunt. 795.

## PAGE v. NEWMAN. — p. 489.

A suit commenced in K. B. by latitat may be well continued by a bill of Middlesex, sued out by the plaintiff, with intent to implead the defendant for the same causes of action.

DECLARATION on a promissory note of the defendant, dated the 18th of April, 1814. Plea, that the causes of action mentioned in the declaration did not accrue within six years next before the exhibiting the plaintiff's bill. Replication, that within six years after the several causes of action accrued to the plaintiff, to wit, on the 30th of June, 1819, in the 59 G. 3, he, plaintiff, for recovery of his damages sustained by him, by reason of the not performing the several promises and undertakings in the said declaration mentioned, sued out a latitat, whereby, (after reciting a previous bill of Middlesex commanding the sheriff of that county to take the defendant, and him safely keep, so that he might have his body to answer the plaintiff in a plea of trespass, and also to a bill of the plaintiff to be exhibited against the defendant for 300*l.*, upon promises, and a return thereto of non est inventus;) the King commanded the sheriff of Kent to take the defendant, &c., to answer the plaintiff in the plea, and the bill aforesaid. It then set out a return of non est inventus, and the non-appearance of the defendant, and then stated that the plaintiff prayed another latitat to the sheriff of Kent, returnable on Monday next after eight days of St. Hilary, for the defendant to answer in the plea and to the bill aforesaid; and that on that day in the court of King's Bench at Westminster, came the plaintiff, by his attorney aforesaid, and offered himself against the defendant in the plea and bill aforesaid; and the sheriff of Kent did not send the last-mentioned writ, nor did he do any thing thereupon, nor did the defendant come or appear in the court of King's Bench, according to the exigency of the said writ. The replication, after stating similar continuances from term to term to Easter term, 1826, proceeded thus:—Wherefore the plaintiff, for recovery of his damages by him sustained by reason of the not performing of the said promises and undertakings in the said declaration mentioned, prayed another precept, called a bill of Middlesex, against the defendant in form aforesaid, and it was granted to him, returnable before our lord the now King at Westminster, on Friday next after the morrow of the Holy Trinity, for the defendant to answer the plaintiff in the plea and the bill aforesaid, and the same day, &c. After stating the appearance of the plaintiff and defendant it averred, that the said several writs, and the said last-mentioned precept respectively, were so sued and prosecuted by the plaintiff against the defendant as aforesaid, with intent to implead the defendant upon and for the said several causes of action in the said declaration mentioned, and to cause and compel the defendant to appear in the said court here, in order that the plaintiff might, upon such appearance, exhibit his bill, and declare against him, defendant, for the said several causes of action in the said declaration mentioned, &c. And the plaintiff afterwards, in Trinity term, in the 7 G. 4, exhibited his bill, and declared thereon against the defendant, to wit, at, &c. Averment that the said several causes of action did accrue to the plaintiff within six years before the issuing of the first-mentioned writ, in manner and form, &c. Rejoinder, that no precept, called a bill of Middlesex, against the defendant was sued out or prosecuted by the plaintiff, previously to the said prayer of the plaintiff of another precept called a bill of Middlesex, and so sued and prosecuted by plaintiff against the defendant, as in the replication was mentioned. And this, &c. Demurrer.

*Reader*, for the plaintiff. It has been decided that a latitat without a bill of Middlesex, if properly issued and continued on the roll, is a good commencement of the suit to avoid a plea of the statute of limitations, *Coles v. Sibeye*, Styles, 156. It is in the nature of an original writ, *Davey v. Clinch*, 1 Sid. 58; *Culliford v. Blandford*, Carth. 238; *Brown v. Babington*, 2 Ld. Raym. 882; *Wood v. Newton*, 1 Wils. 141; and *Foster v. Bonner*, Cowp. 454. Then, if the latitat was a good commencement of the action, the rejoinder, which states that no bill of Middlesex was sued out in the first instance, is bad; and that being so, the next question which arises upon the replication is, Whether the bill of Middlesex sued out after the last latitat is a good continuance of the suit. Now it is possible that the plaintiff could not have adopted any other course. If the defendant were in Middlesex, no other process could reach him, for the service of a latitat in Middlesex is irregular, *Price v. Jackson*, 1 M. & S. 442. Suppose a bill of Middlesex to have been actually sued out in the first instance, and that the defendant had gone into Kent, or any other county, and a latitat had been issued into such county, and the defendant had returned into Middlesex, it is quite clear that another bill of Middlesex might have been sued out, and that it would have been a good continuance of the same suit, and not a commencement of another suit. Now, every latitat presupposes a previous bill of Middlesex. If the latitat be a good commencement of the action, a bill of Middlesex with intent to follow up the suit commenced must be a good continuance of that suit. The process is of the same description, and it is sufficient to show that the plaintiff is proceeding to bring the defendant into Court in the suit originally commenced. Besides, this at most is a mere irregularity. In *Karver v. James*, Willes, 255, it was decided that a process voidable by reason of its being returnable on a common return-day, and not on a day certain, was sufficient to avoid the statute. In *Lord Middleton v. Forbes*, Willes, 259 n., it was holden, that a writ sued out by a woman before marriage was well connected with subsequent proceedings by herself and her husband. *Plummer v. Woodburne*, 4 B. & C. 625, shows that a writ professing to be bailable, with an *ac etiam* clause, is a good continuance of a common writ.

*Comyn*, contra. The rejoinder assumes that if the action had been commenced by bill of Middlesex, and afterwards continued by latitat, it might be subsequently continued by a bill of Middlesex. But the demurrer admits that no bill of Middlesex was sued out before the last latitat issued, and the only question raised in this case is, Whether a bill of Middlesex is a good continuance of a suit commenced by latitat, without any previous bill of Middlesex? Although it must be conceded that an action may be well commenced by latitat, yet the more regular course would be, first, to sue out a bill of Middlesex. Every latitat recites that a bill of Middlesex has issued, and that the sheriff of Middlesex has returned non est inventus. A bill of Middlesex, therefore, is, *primâ facie*, the first process in a suit, a latitat the second. The issuing of a bill of Middlesex, *primâ facie*, imports the commencement of a new suit, and not the continuance of one. The latitat and bill of Middlesex are kept on distinct rolls. If the latitat had been shown to have issued in a suit in which a bill of Middlesex had first issued, it might well have been continued by the latter. [*Bayley*, J. If the defendant had been in Kent at the time when the first latitat issued, and he had afterwards removed into Middlesex, would not a bill of Middlesex have been a good continuance of the suit commenced by latitat?] No such facts are stated

upon this record, and they are not to be assumed. No sufficient cause is alleged for varying the process. The bill of Middlesex, therefore, must be taken upon this record to be the commencement of a new suit, and not the continuance of one already commenced by latitat.

BAYLEY, J. I have no doubt that the bill of Middlesex was in this case a good continuance of the suit which had been commenced by latitat. It has been decided, that a latitat is a good commencement of a suit. To continue a suit, the process by which the party is ultimately brought into court, must be of the same description as that which was originally sued out. A bill of Middlesex and a latitat are process of the same kind. The court, in virtue of its jurisdiction in the county where it sits, issues against parties resident in that county a bill of Middlesex. If the defendant be not found in the county of Middlesex, the court issues a latitat into some other county. The latitat issues, therefore, on the supposition that a bill of Middlesex has previously been issued, and that the defendant has not been found in that county. The replication in this case set out a latitat, whereby (after reciting that a bill of Middlesex had issued, whereby the sheriff of that county was commanded to take the defendant, &c. &c., to answer the plaintiff in a plea of trespass, and to a bill to be exhibited against him) the King commanded the sheriff of Kent to take the defendant, &c., to answer the plaintiff in the plea and bill aforesaid; and by the latitat subsequently issued from term to term, and the bill of Middlesex issued in Easter term, 1826, the defendant is called upon to answer the plaintiff in the plea and the bill aforesaid. The last process, therefore, issued to compel the defendant to answer the plaintiff in the same plea, and to the same bill, which he was called upon to answer by the latitat which was first sued out. So that, upon the face of the process itself, the bill of Middlesex would rather appear to have been issued in the same suit. But the plaintiff then avers, that the said several writs, and the said last-mentioned precept respectively, were so sued out by the plaintiff against the defendant with intent to implead the defendant upon the several causes of action in the declaration mentioned. It must be taken, that the bill of Middlesex and the latitat were issued with the intent to prosecute the same causes of action. The defendant, by the rejoinder, alleges, that no bill of Middlesex was sued out by the plaintiff before that which issued after the last latitat. But it having been decided, that a suit may be well commenced by a latitat without a previous bill of Middlesex, the fact stated in the rejoinder is wholly immaterial. The rejoinder, therefore, is no answer to the replication. I think the replication is good. A suit commenced by latitat may be continued by process of the like kind. A bill of Middlesex and a latitat are processes of the same kind; for they are frequently issued in the same suit; and one instance has been put in argument, where a bill of Middlesex would of necessity be the only process by which a suit commenced by latitat could be continued. It is clear, therefore, that a bill of Middlesex may be a good continuance of such a suit. And as it appears by the replication that it was sued out with the intent to implead the defendant for the same causes of action as those for which the latitat was sued out, I think that in this case it was a good continuance of the suit. I am, therefore, of opinion, that the suit which was originally commenced by latitat was properly continued by the bill of Middlesex, and, consequently, that the plaintiff is entitled to the judgment of the Court.

## HUBBARD v. WILKINSON.—p. 496.

A defendant having been arrested, paid into court the sum indorsed on the writ, together with 20*l.*, as a security for costs, pursuant to the stat. 7 & 8 G. 4, c. 71, s. 2. The Court, on the application of the defendant, allowed the plaintiff to take out of court a given portion of the sum paid into court, and unless he consented to accept thereof, with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any evidence at the trial as to that sum.

THE defendant in this suit having been arrested for a debt of 70*l.*, instead of putting in and perfecting bail, paid into Court that sum (being the sum indorsed on the writ), together with 20*l.* as a security for the costs in the cause, pursuant to the statute 7 & 8 G. 4, c. 71, s. 2.

*Richards* in Easter term last moved, on the part of the defendant, for a rule that the plaintiff should be at liberty to take out of Court 65*l.*, (part of the above sum), and that unless the plaintiff should accept thereof with costs in full discharge of this action, the sum of 65*l.* should be struck out of the declaration, and, upon the trial of the issue, the plaintiff should not be permitted to give evidence for the sum of 65*l.*

The Court, after some hesitation, granted the rule, and in the course of Trinity term the same was made absolute.

Rule absolute.(a)

(a) Since this case came before the Court, similar rules have been granted in two or three other instances.

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DOE, on the several demises of CHARLES PRIDEAUX BRUNE and EDWARD COODE, v. WILLIAM MARTYN the younger.—p. 497.

By marriage settlements between W. M., and T. M., son and heir apparent of W. M., of the first part; J. H. and Mary H. of the second part; and L. G. and J. H., trustees, of the third part; W. M. and T. M. bargained and sold to the trustees certain lands called Ninnisses and Sandry's Fields, and other lands called Varwell, then in possession of W. M. and T. M., to hold unto the trustees, their heirs and assigns, as to Sandry's Fields and Ninnisses, to the use of W. M. for life; remainder to the use of the trustees during the life of W. M. upon trust to preserve contingent remainders, with remainder to the use of the said T. M. for life, remainder to the said trustees and their heirs during the life of T. M. upon trust to preserve contingent remainders, with remainder to the first and other sons of T. M. by M. H. successively in tail male, with remainder to the use of the right heirs male of T. M. forever; and as to all the other

settled premises to the use of T. M. for life, with remainder to the use of trustees, their heirs and assigns, during the life of T. M., in trust to preserve contingent remainders, with remainder to the use of M. H. for her life, for raising out of the rents and profits an annuity of 25*l.* per annum, and subject thereto to the use of the first and other sons of T. M. by M. H. successively in tail male, with remainder for want of issue male by T. M. on the body of M. H. begotten; or if such issue male should die without issue male, and T. M. should have any daughter or daughters by M. H. at the time of his death, then that the trustees, their heirs and assigns, should stand seised of the said hereditaments to the use of the issue female of T. M. by M. H., for raising portions as therein mentioned to such daughter and daughters; and that until twenty-one the trustees and their heirs should out of the rents raise such maintenance of such daughter and daughters as to the trustees should seem meet, and after raising the said sums for the maintenance for such daughter and daughters as aforesaid, or in default of issue female, to the use of the right heirs male of T. M. forever: Held,

First, that the last words were words of limitation, and not of purchase, and that T. M. took the ultimate remainder in fee; and,

Secondly, if they were words of purchase, still they would create a contingent remainder during the life of T. M., which would vest immediately upon his death in his heir, who might devise the same.

Thirdly, that by the limitation as to the Varwell and Crugmere Closes, the trustees took an estate only during the infancy of the daughters; and,

Fourthly, even if they took a fee, it was a fee determinable when the portion should have been raised; and twenty years of possession adverse to their claim having occurred, the presumption was, that the right of the trustees had been released and satisfied.

W. M. died leaving two sons, who died without issue. The survivor of them devised the estate to his wife for life, remainder to all and every the children of Richard E. and M. P. who should be living at the time of his wife's death. There were living at her death nine children of R. E. and M. P. Of these, two during her life, and while their estates remained contingent, had levied fines *sur conusance de droit* come ceo of their shares. In April, 1824, A. B. entered upon the lands comprised in the marriage settlement, and kept possession, and in May, 1824, all the children of R. E. and M. P. by lease and release conveyed the lands comprised in the marriage settlement in given proportions to a purchaser: Held, that the children of R. E. and M. P. might convey their interests without having first made any entry into the land, although A. B. was in possession.

Secondly, as to the shares of the two who had levied fines while their estates were contingent, that their interest was not thereby extinguished.

**EJECTMENT** for the recovery of certain lands in the parish of Padstow, in the county of Cornwall. At the trial, before *Burrough*, J., at the Lent assizes for that county, in 1825, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:—

By indentures of lease and release, dated the 5th and 6th of November, 1722, the release being tripartite, and made between William Martyn, Gent., and Thomas Martyn, Gent., son and heir apparent of the said W. Martyn, of the first part, Jenefer Hooper, widow, and Martha Hooper, her daughter, of the second part, and Lawrence Growden, Gent., and John Hooper, Gent., of the third part, in consideration of a marriage then intended between said Thomas Martyn and said Martha Hooper, and of the marriage portion of Martha Hooper, and for securing to her a competent jointure and for limiting the said hereditaments, thereafter mentioned; and in consideration of 10*l.*, W. Martyn and T. Martyn did grant, bargain, sell, alien, and enfeoff, remise, release, convey, secure, and confirm unto the said L. Growden and John Hooper one field called Nin-nisses, in the village of Tretor, in Padstow, two fields called Sandry's

Fields, lying in the village and fields of Crugmere, in Padstow, and divers others fields, amongst which were some called the Varwell Closes in Crugmere, in Padstow, all which said premises were then in the possession of the said W. Martyn and T. Martyn, or one of them. And the reversion, &c., and all the estate, &c., and all deeds, &c., to hold unto L. Growden and John Hooper, their heirs and assigns; as to Sandry's Fields and Ninnisses, to the use of the said W. Martyn for life, remainder to the use of L. Growden and John Hooper, and their heirs during the life of said W. Martyn, upon trust to preserve contingent remainders, with remainder to the use of the said Thomas Martyn for life, remainder to the use of the said trustees and their heirs during the life of the said Thomas Martyn, upon trust to preserve contingent remainders, with remainder to the use of the first, second, third, &c., and other sons of the said Thomas Martyn, by the said Martha Hooper successively in tail male, with remainder to the use of the right heirs male of Thomas Martyn forever. And as to all other of the said settled premises, to the use of Thomas Martyn for life, with remainder to the use of the trustees, their heirs, and assigns, during the life of Thomas Martyn, in trust to preserve contingent remainders, with remainder to the use of Martha Hooper for her life, for raising out of the rents and profits an annuity of 25*l.*, and subject thereto, to the use of the first, second, third, and other sons of Thomas Martyn by Martha Hooper successively in tail male, with remainder for want of male issue by Thomas Martyn on the body of Martha Hooper, or if such issue male should die without issue male, and Thomas Martyn should have any daughter or daughters on the body of Martha Hooper lawfully begotten and living at the time of his death; then that Lawrence Growden and John Hooper, their heirs and assigns, should stand and be seised of the said hereditaments to the use and behoof of the issue female of Thomas Martyn on the body of Martha Hooper, for raising and levying out of the rents, issues, and profits thereof such sum and sums of money to pay and satisfy such portion and portions to and with such daughter and daughters at such time and times as are hereinafter mentioned, that is to say, if one daughter, the sum of 600*l.*, and if two daughters, to each of them the sum of 400*l.*, and if more than two daughters, the sum of 800*l.* to be equally divided between them at twenty-one; but if it should happen that the said sums and sum aforesaid could not be advanced and risen by and out of the profits of the said hereditaments at the times of payment thereof as aforesaid, then and notwithstanding the said premises should stand and be charged with the payment of the portion or portions aforesaid, when and as soon after as the same could be advanced and raised out of the rents, issues, and profits thereof. And that until twenty-one, the trustees and their heirs, and the survivor of them and his heirs, should, out of the rents, raise such maintenance of such daughter and daughters as to the said trustees, their heirs and assigns, should seem meet and convenient. Proviso, that if such daughters should marry without consent, or the said Thomas Martyn should by deed or will revoke the said portions, the same portions should go to such other persons as the said Thomas Martyn should direct. And from and after raising, levying, and paying of the sum and sums of money as aforesaid to and for the maintenance and education and portion to, for, and with such daughter and daughters as aforesaid, or for

default of issue female, to the use and behoof of the right heirs male of the said Thomas Martyn forever, and so that all and singular the thereby granted and conveyed premises, with the appurtenances, should go, descend, and be in the blood, name, and family of Thomas Martyn and his heirs and assigns forever.

William Martyn, one of the settlors, died in the year 1722, and Thomas Martyn, the other settlor, died in 1740, leaving issue two sons, William, his eldest son and heir, and Hooper. William, the eldest son, entered into the estates in question, and died without issue, in 1779, leaving Hooper, his brother and heir, and he, after the death of his brother William, entered into the premises, and continued in possession of them till 1795, when he died, leaving no issue. The only other issue of Thomas Martyn, the settlor, were Martha Martyn and Grace Martyn. Martha died in 1793, unmarried, and without issue. Grace married James Elliott, who died in 1761, leaving the following issue:—1st, Thomas Elliott; 2d, Richard Elliott, who married Agnes Best; 3d, Martha Elliott, who married Parnall. Richard Elliott had three children: 1st, W. M. Elliott; 2d, Agnes Elliott, who married Joseph Martin; 3d, Grace Elliott. Martha Parnall had several children: 1st, William Parnall; 2d, Andrew Parnall; 3d, John Parnall; 4th, Grace Parnall, who married Samuel Thomas; 5th, Edward Parnall; 6th, Mary Parnall. On the 26th September, 1795, Hooper Martyn made his will in writing, duly executed according to the statute of frauds, bearing date the day and year last aforesaid, by which he devised all the premises in question to his wife Peggy (afterwards, by her second marriage, called Peggy Hoblyn) for life, with remainder to all and every the son and sons, daughter and daughters, of his nephew Richard Elliott, and of his niece Martha Parnall, who should be living at the time of the decease of his said wife, share and share alike, as tenants in common, and not as joint-tenants, and to their heirs and assigns forever. Peggy Hoblyn died 12th March, 1824, and at the time of her death the issue of Richard Elliott and Martha Parnall then alive and entitled (if by law they might be so entitled) to take under Hooper Martyn's will, were the several persons above named. No evidence was given of the actual raising of the sums directed to be raised by the settlement of 1722 for the benefit of the female issue, and charged on part of the premises in question; but on the death of Hooper Martyn, his widow and devisee as aforesaid took possession of all the premises, and continued in the enjoyment of them from that time without interruption, except as hereinafter mentioned. For some time previously to Michaelmas, 1822, one Hawken had been tenant, to Mr. and Mrs. Hoblyn, of the closes called Ninnisses and Sandry's Fields, but his tenancy ended at that time; and shortly before he quitted possession he was served with the following notice, signed by the defendant's father:—"Whereas I claim to be owner and proprietor of all those fields called Sanders or Sandry's Fields, and Ninnisses Park, situate within the parish of Padstow, in the county of Cornwall, which you now occupy at an annual rent; now I do hereby give you notice, that I intend to institute legal proceedings for the recovery thereof; and further; that you are not to pay any rent which now is, or hereafter may accrue, due, for the same to any person or persons whomsoever, without my knowledge and consent. Dated this 3d day of June, 1822." Shortly after Hawken had quitted these premises, the defendant's father went to all the closes, claiming to enter as lawful heir, to take possession, and cut



a turf, in the several closes, but he did not keep or continue in possession. Mr. Hoblyn received the rent due at Michaelmas, 1822; he could not then get another tenant, but he afterwards let the premises to one Retallick. At Michaelmas, 1823, the defendant, with his father, went again to the several closes, and turned out the cattle then therein; and in April, 1824, they went again, and began to plough the fields, which was objected to on the part of Mr. Brune, but the defendant persisted, and has kept possession since that time. After Michaelmas, 1824, the defendant paid the reeve of the manor of Trevoise, one year's chief rent for Sandry's Fields and the Varwell's parcel of the premises in question due to the said manor.

By indentures of lease and release, bearing date the 6th and 7th of May, 1824, the children of Richard Elliott and Martha Parnall living at the time of Peggy Hoblyn's death (the husbands of the married female children being parties to the deeds) conveyed their interest to the lessors of the plaintiff. These deeds recited several former conveyances, and, amongst others, deeds of lease and release, and a fine sur conusance de droit, &c., by Joseph Martyn and Agnes his wife, formerly Agnes Elliott, unto Edward Coode and his heirs, of Michaelmas term, 48 G. 3, and lease and release and a fine sur conusance de droit come ceo by Samuel Thomas and Grace his wife, formerly Grace Parnall, to the said Edward Coode, of Trinity term, 54 G. 3.

In Trinity term, 1824, a fine was levied in pursuance of a warrant contained in the deed of May, 1824; and the third proclamation was in Hilary term, 1825.

The declaration contained two demises of the same date, viz., the 1st of September, 1824, the first by C. P. Brune, and the second by Edward Coode, and the premises sought to be recovered were Ninnisses, Sandry's Fields, and the Varwell Closes in Crugmere. This case was argued at the sittings in banc, after last Easter term, by

*Preston* for the lessors of the plaintiff. According to the general rules of law, and the rule in *Shelly's* case, 1 Co. 93, wherever an estate for life is given to the ancestor with a limitation to his heirs in any way, the two estates unite, and, therefore, in this case the estate for life given to T. Martyn by the settlement united with the ultimate remainder to his right heirs male, and became either an estate in tail or in fee to him and his male heirs. For want of words of procreation it was not an estate tail; if an estate in fee the word *male* must be rejected, for no one can create a new rule of descent, and then it was an estate in fee-simple, Lord *Ossulston's* case, 3 Salk. 336, 11 Mod. 189; *Dawes v. Ferrers*, 2 P. Wms. 1, where Lord *Macclesfield* said he would not allow the bar to dispute what was the foundation and landmark of the law, viz. that under such circumstances the word *male* must be rejected, and the estate given to the heir general. Under that settlement, then, Hooper Martyn had a vested remainder in fee at the time when his will was made, and under his devisees the lessors of the plaintiff claim. This applies equally to all the property; for although the second division of it was given to trustees and their heirs to the use of the issue female for certain purposes, it must be presumed that those purposes have been long since answered. The only point that can be made for the defendant is, that he, by entering after the death of Peggy Hoblyn, disseised the devisees of Hooper Martyn, and that the fine afterwards levied by them works by estoppel to protect the disseisor. But no disseisin is found by the case; and even supposing the estoppel to apply,

the lessor of the plaintiff is still entitled to two ninth shares; for in the lifetime of Peggy Hoblyn, Agnes Elliott and Grace Thomas, two of the nine devisees of Hooper Martyn, by lease and release and fine surconsuance de droit come ceo, conveyed their shares to the lessor of the plaintiff, and, therefore, he has a title by estoppel to those two shares prior to any title by estoppel which the defendant can in any way set up, *Helps v. Hereford*, 2 B. & A. 242. However, as there was no disseisin by the defendant, his argument as to the estoppel is unavailing.

*Farquhar Fraser*, contra. The words "heirs male," in the ultimate remainder in the settlement of 1722, are words of purchase. It must be admitted, that the rule in *Shelley's case* is not to be dispensed with, unless there is a clear intent to make use of the latter words as words of purchase. But Fearn, Contin. Rem. 148, 6th ed., says, "Some instances there are even in cases at common law wherein the subsequent limitation to the heirs of the body has been so qualified and corrected by other additional words, as to amount to words of purchase and not of limitation." And they were held to be words of purchase in *Waker v. Snowe*, Palmer, 359, and *Lisle v. Gray*, 2 Lev. 223, inasmuch as it was presumed that the parties intended to use them in that sense. Now, here these words cannot create an estate tail for want of words of procreation, neither can they create an estate in fee, unless the word *male* be rejected, and no word ought to be rejected if a sensible meaning can be given to it. By construing these as words of purchase, they will bear a sensible meaning, and the ultimate declaration of an intention to keep the estate in the family and name of Martyn shows that to be the true meaning in which they were used. If so, at the date of Hooper Martyn's will this remainder was contingent, and, therefore, could not be devised. [*Bayley*, J. Suppose these to be words of purchase, and that there is no person answering the description, then is not the effect the same as if they had not been in the deed?] The remainder was contingent until the death of the particular tenant for life, and if at that time there was no person answering to them, the estate would descend to the heir of the settlor. But in this case Thomas Elliot is the heir general, and there is no demise by him. [*Bayley*, J. If by will an estate is given to A for life, remainder to B. in fee if he be living at his death, on the testator's death would anything descend to his heir, or what would become of the fee?] It would be in abeyance, and would not descend to the heir liable to be divested on the happening of the contingency. [*Bayley*, J. According to *Purefoy v. Rogers*, 2 Saund. 381, the fee would not be in abeyance, but in this case would be in Hooper Martyn, and by him devisable.] That question was only on a devise, and not on a settlement by lease and release. But supposing this point to be in favour of the lessor of the plaintiff as to the Ninnisses and Sandry's Field, it does not affect the residue of the property which was settled to different uses. In those lands the trustees took an estate in fee. The sums of money for the portions of the daughters were not raisable until after Hooper Martyn's death without male issue, which happened in 1795. If the trustees took the fee, no estate could be limited after it, although it was determinable, and then the interest in the heirs of T. Martyn was only an equitable interest. The words are large enough to give the fee to the trustees, and there is no definite period at which the estate was to cease, they, therefore, took the fee, *Doe v. Willan*, 2 B. & A. 84. If the trustees took

only a chattel interest, it is not stated that the portions have been raised, and that should be decided by a jury; the Court will not make the presumption, *Doe v. Passingham*, 6 B. & C. 305. In the next place, it cannot be denied that the interests created by Hooper Martyn's will subsequent to the death of Peggy Hoblyn were contingent, and such an interest cannot be assigned at law, *Lampet's case*, 10 Co. 46, et ib. note (D), although according to the words of the statute of wills it may be devised, *Doe v. Tomkinson*, 2 M. & S. 165. If so, the lease and release by Agnes Elliott and Grace Thomas conveyed no estate. Neither did the fines give any title, but on the contrary, they operate as an extinguishment of the contingent interest of those two persons, *Buckler's case*, 2 Co. 56, 6th resolution; *Weale v. Lower*, Pollexf. 54. [*Bayley, J.* It was there held that the fine operated by way of estoppel.] That was a fine sur concessit, and the fifth resolution is express, that if it had been levied in fee it would have destroyed the contingent use. In *Vick v. Edwards*, 3 P. Wms. 372, Lord Talbot, says, that a fine levied of a contingent interest will pass a good title by way of estoppel, but he does not mention the species of fine; and as he refers to *Weale v. Lower*, probably a fine sur concessit must have been meant. This is explained in the fourth resolution in *Weale v. Lower*, where it is said, "A fine was levied sur concessit for years; it did not displace the fee; and when that vested it fed the estoppel, and then the estate by estoppel became an estate in interest, and was the same as if the contingency had happened before the fine was levied." *Helps v. Hereford*, 2 B. & A. 242, cited on the other side, is distinguishable. There, while the fee simple was in the ancestor, the heir conveyed by fine. It could only operate by estoppel. The heir had no interest to convey. It was, therefore, like the common case of a deed between two parties; the one professing to convey having no interest, it works by estoppel. Here, however, the party to the fine had an interest devisable or descendible, although not assignable. *Davies v. Bush*, M'Clelland & Younge, 58, and *Tyrrel v. Marsh*, 8 Bingh. 31, are exceptions from the general rule, and merely decide that a fine will not have the effect of extinguishing powers where that appears to be contrary to the intention of the parties. [*Bayley, J.* The fine in this case clearly was not levied for the purpose of extinguishing the interest.] Neither could that intent be supposed to exist in any of the cases where it has been held so to operate. Lastly, as no entry was made by the devisees of Hooper Martyn after the death of his widow, no conveyance of their interest could be made, and in the declaration there is no demise by them. [*Bayley, J.* If they could demise for the purpose of bringing ejectment, why could they not convey?] The case of *Goodright v. Forrester*, 8 East, 552, shows that a person having a right of entry may demise but cannot convey it. Here the defendant Martyn was an intruder, if not a disseisor, and after intrusion an entry must be made by the party entitled before he can convey. In *Co. Lit.*, 49 a, it is said, "If the feoffor be out of possession (not, if he be disseised), neither fine, recovery, indenture of bargain and sale enrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of the feoffor and make a perfect tenant of the freehold, but only livery of seisin upon the land;" and *Butcher v. Butcher*, 7 B. & C. 399, confirms this view of the case.

*Preston* in reply. The first point made for the defendant is clearly answered by Lord *Ossulston's case*, and *Counden v. Clerke*, Hob. 29, which shows that where the words "heirs male" have been treated as words of purchase, it has been held necessary that the party claiming to take under them should be both heir and male. If they are meant to point out a special heir, that can only be in case of an estate tail, which this clearly was not. As to the second point, whatever was undisposed of by the settlement was not in abeyance, but vested in the heir of Thomas Martyn, until it could vest according to that deed, and in the mean time was grantable or devisable. Hooper Martyn, the heir, did devise it, and under that devise the lessors of the plaintiff claim. The third point was applicable to those parts of the estate in which the issue female were interested. It is contended that the trustees took the fee, but there are no words to warrant that construction. The use is limited to the issue female, and the legal estate was executed in them by the statute. Then the trustees were, for one purpose, to receive the rents, that, however, only gives a chattel interest, *Jemmott v. Cooley*, 1 Lev. 170. It is a common case that an estate should be holden by a party and his heirs until, &c., and that is not a fee. Their estate was at all events to cease when the daughters attained twenty-one, and as it could not in any event become absolute it was not a fee. Even if the trustees had taken a fee, the argument founded on the principle that no estate can be limited after a fee would not be applicable, for that principle does not effect wills or conveyances to uses. Then as to the conveyance by the devisees of Hooper Martyn, they had not any grantable or assignable interest, nor was it devisable or releasable, *Leake v. Robinson*, 2 Mer. 363, *Jee v. Audley*, 1 Cox, 324, it could, therefore, only be bound by estoppel, and in that mode the lease and release and fine by them operated. With respect to the destruction of the contingent interest by the fine, *Davies v. Bush* is expressly in point that it would not have that effect. The case of disseisin put in *Buckler's case* is wholly different. There the disseisor had the seisin, the disseisee had only a right, and the law will not allow a right to be parted with, and even that case was denied in March, 66. The point put in *Weale v. Lower* related to the case of a contingent remainder to a party ascertained, and it was an obiter dictum not necessary to the decision of the case then before the Court. But supposing the estate was not grantable after the death of Peggy Hoblyn without entry, still the lessor of the plaintiff has a previous title to two ninths perfected by estoppel.

*Cur. adv. vult.*

BAYLEY, J., now delivered the judgment of the Court; and after stating the facts of the case, proceeded as follows: The first question in this case is, What is the effect of the limitation to the use of the right heirs male of Thomas Martyn? whether those words are words of limitation or words of purchase? It was conceded, and rightly, by Mr. *Fraser*, that they were to be taken as words of limitation, unless a contrary intention was manifest. But he contended that a contrary intention was manifest

and that the limitations looked to such person as should be heir male of Thomas Martyn at the time the preceding estates should fail. I cannot see any such contrary intention. Were I at liberty to conjecture, the opinion I should form would be, not that the settlor was looking to any particular individual, or meant to make an object of his bounty any individual who at a distant, indefinite time might fill the character of heir male, but that he meant to create a general estate in tail male in himself, and that he unintentionally omitted the words to show of whose body they were to be heirs male. The consequence of this would be, that these would be words of limitation, that the word "male" must be rejected, and that under these words Thomas took immediately the ultimate remainder in fee.

But suppose these to be words of purchase, would it bar the lessors of the plaintiff? Upon the execution of the deed this would be a contingent remainder, because *nemo est hæres viventis*, and during the life of Thomas Martyn, no one could be his heir or heir male. But why should it not vest the instant Thomas Martyn died? The law leans to the vesting of estates; and as soon as a person comes in esse who fills the character to which a given remainder looks, that remainder vests, unless there is something to show an intention that it should not then vest. Is there any thing to show such an intention here? The limitation is not specially to the *then* right heirs male of Thomas Martyn, or to such persons as shall *then* be such heirs male, but generally, to the right heirs male of Thomas Martyn. As soon, then, as any person filled that character, and answered that description, that remainder vested in interest. Upon the death of Thomas Martyn in 1740, the remainder vested in William, who was then his heir, and on William's death in 1779, the remainder descended in fee upon Hooper, and he had therefore power to make a will.

The next question applies, not to the whole estate, but to that property only which is included in the second branch of the settlement, viz., the Varwell Closes and the property in Crugmere. This question is, Whether the limitation to the trustees to the use of the issues female of Thomas Martyn vests the whole fee in the trustees so as to prevent the persons who claim under the ultimate remainder from having any claim at law. The limitation is, that for want of issue male of Thomas Martyn by Martha Hooper, or if such issue should die without issue male, and Thomas Martyn should have a daughter or daughters by Martha Hooper living at his death, then the trustees, their heirs and assigns, should stand seised to the use and behoof of the issue female of Thomas Martyn by Martha Hooper, for raising out of the rents, issues, and profits of the estate, 600*l.* if there were only one daughter, and 800*l.* if there were more, to be paid to them at twenty-one; and if such sum could not be raised out of the profits by the time of payment, then the premises should stand charged with those sums till they could be raised out of the rents, issues, and profits. Till twenty-one, (i. e. until the daughters attained twenty-one,) the trustees and their heirs were to raise such maintenance for the daughters as they should think meet. The trustees, therefore, have no express power given them over the rents except during the infancy of the daughters. Upon the daughters attaining twenty-one, the use seems executed in the daughters, and it is to them, and to them only, the control appears to be given over the rents, issues and profits. Suppose, however, that the legal estate vested in the trus

tees, and that the 600*l.* or 800*l.* in the events which happened were to have been raised, and that the trustees were the persons to have raised them, and that they took a fee, it is impossible to say they took more than a limited fee, a fee which must determine when the 600*l.* or 800*l.* should have been raised, and the ulterior right expectant upon the determination of that limited fee must at law have been in the heir of the settlor, not by way of limiting a fee upon a fee, but because it was part of the old right; and upon failure of the estates which were limited by the settlement it returned back to the settlor. The doctrine applicable to this part of the subject is to be found in Co. Litt. 191 a. n. 1. Considering, then, that no claim appears to have been made by the trustees, that nearly twenty years of a possession adverse to their claim had occurred at the time this ejectment was brought, and that much more than the full term of twenty years' adverse possession is since completed, (for the defendant's possession not being shown to be under them, or on their behalf, must be taken to be adverse to their claim,) and that up to the present time they appear to have made no claim, can the defendant avail himself of this supposed right in the trustees? The presumption at this distance of time is, either that it was released or satisfied; and we think it too doubtful and too distant to be a defence in the mouth of a stranger.

The next point I shall consider is, Whether the conveyance of the 6th and 7th of May, 1824, passed any interest to the lessors of the plaintiff; and upon that I cannot bring my mind to doubt. The objection is, that the remainder-men (the grantors) had not entered at the time the deeds were executed, and that the defendant had. First, was an entry by the remainder-men necessary? It is conceded, that in ordinary cases it would not be. But it is said, that this is to be treated not as an ordinary case, because the defendant had entered. There is no authority to show such a conveyance to be inoperative. In Co. Litt. 49 a. it is said, "If the feoffor be out of possession, a fine, recovery, indenture of bargain and sale enrolled, or other conveyance, does not avoid an estate by wrong." It does not say that the conveyance is void. But what estate had the defendant here? The remainder-men were entitled to treat him as having an estate by intrusion, for the sake of the remedy; but it does not lie in his mouth, as against them, to say he had any estate. What are the facts? On the 12th of March, 1824, Peggy Martyn, the tenant for life, died. Was any one then in possession? The case does not state the fact. Did any of the remainder-men enter, or any person on their behalf? The case as to that is silent. Some time in April, non constat when, the defendant entered, and began to plough the fields. This was objected to on the part of Brune, but not by the persons in whom the legal estate was vested. But did Brune know it? Did Coode or any one of the remainder-men know it? Non constat that they did; and on the 7th of May the conveyance was made. Had the sale been of a pretended title only, the case would have been within the operation of the 32 H. 8, c. 9. But to bring a case within that statute, the seller must have a pretended right only, and the information must aver that it is a pretended right only, for that is the point of the action, *Rex v. Barnes*, Cro. Car. 233. 1 Hawk. c. 86, s. 10. Dy. 74. This was a sale not of a pretended but of a valid title, where the possession had gone with that title till within two months of the sale, and there had been no act of dispossession (if there ever was one) till within a much shorter period. It has been argued, that the conduct of the defendant amounted to what the law considers an intrusion, and that at the time

of the conveyance of May, 1824, the defendant was in the land as an intruder. But what does the law consider an intrusion? Not a mere wrongful entry into possession, (unless the rightful owner chooses so to consider it.) but a wrongful possession of the *freehold*; and what Lord *Ellenborough* lays down in *William v. Thomas*, 12 East, 155, as to disseisin, applies also to the case of intrusion, both equally ousting the right owner, not from the possession merely, but from the possession of the freehold. He there says, "Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the lords' court." But what act of notoriety is here stated to have been done by the defendant as claiming to put himself in the place of the rightful freeholder? At most, he was only in possession six weeks. It appears to me, that he had no such estate by wrong as to prevent the remainder-men from making a valid conveyance.

The last objection applies to two shares only, those of Agnes Martyn and Grace Thomas, and the foundation of the objection is this, — that before Peggy Martyn's death, and whilst their estates were contingent, they levied fines sur consueance de droit come ceo, and that all right as to their shares was thereby effectually extinguished and destroyed. These fines were not produced in evidence at the time of the trial, and do not constitute part of this special case; but as they are stated in the deeds of 6th and 7th May, 1824, we are bound to assume there were such fines; and if such fines had the effect supposed, those deeds are upon the face of them bad as to these two shares. The fines are described in the release, as stated in this case, not as fines sur concessit, (which if for years only would have worked no destruction or extinguishment,) but the one as a fine sur consueance de droit, &c., and the other as a fine sur consueance de droit come ceo. Upon the question as to the effect of such a fine upon a contingent remainder, the authorities and opinions of text writers are contradictory. The effect of a fine in fee on a contingent remainder is considered by Mr. Preston in the first volume of his *Treatise on Conveyancing*, p. 209, and he seems to think that the fine will in all cases have the effect of destroying the contingent remainder. Mr. Fearné thinks otherwise.

A contingent remainder cannot be passed or transferred by a conveyance at law. But in equity it may. In *Whitfield vs. Fawcett*, 1 Ves. 391, on a marriage settlement, a rent was created to the use and intent that the heirs of the body of the wife and their heirs should receive such rent, and subject thereto the land was limited to the husband and his heirs. There were two sons of the marriage, and they, in the life of the father and mother, sold this rent to the plaintiff without fine. The estate was the father's. Lord *Hardwicke* held that the sons had not an actual possibility at the time they sold; the rent might never arise, or if it did, the sons might not be heirs of the mother's body at her death. Nothing, therefore, passed by that conveyance in point of law, it being by deed, and not by fine, which, had it been levied of this rent, and they had survived their mother, would have operated as against them by estoppel, binding them and their heirs. In *Wright v. Wright*, 1 Ves. 411, testator devised in fee to his two daughters, but that if either died unmarried, his son Robert should take the estate in fee, paying the other daughter 500*l*. Testator died. Robert, in consideration of natural love, conveyed the land and all his claim and right therein to his younger son George in fee.

Robert died. One daughter died unmarried. Robert's elder son filed a bill, claiming the estate on paying the other daughter 560*l*. The question was, Whether the conveyance to George was a bar to the claim of the elder son ; and Lord *Hardwicke* held it was, for though the limitation to Robert was by way of executory devise, and therefore a possibility only, which the law will not permit to be granted, yet it may be disposed of in equity to a stranger ; and the bill was dismissed with costs.

But, although a contingent remainder cannot be conveyed at law, it may be extinguished ; and the question is, Whether a fine in fee of necessity extinguishes it. It may be conceded that a fine, if so intended, will have that effect, and as far as this case is concerned, that such shall *prima facie* be taken to be the intention ; but the question is, Whether it shall so enure where a contrary intention is apparent. Mr. Preston, in his *Treatise on Conveyancing*, seems to think it shall. I do not cite this book as an authority, though from the learning, research, experience, and discrimination of the author, it is *extra-judicially* entitled to great weight ; but I refer to it because it states the doctrine concisely, and the reason of it, and gives a reference to all the authorities. The passage to which I refer is to be found in p. 209, and is as follows: " A person who has merely a right of action or of entry, or a *contingent* remainder, or *other future or executory interest*, which does not give a vested estate, should cautiously avoid levying this species of fine, (i. e. a fine sur conuissance de droit come ceo,) unless he means to *extinguish* his interest ; for as rights of action, &c., (of course including *contingent* remainders,) cannot be transferred, the conusee in the fine cannot derive any advantage from the fine. On the other hand, *strangers to the fine*, that is, persons not parties to it, may avail themselves of it, to preclude the title of the conusor, and a party will not be allowed, in opposition to his own fine, to assert a title to the land. The consequence is, the fine enures to the benefit of the persons to whom the right might have been released, exactly the same as if the fine had been a release." The opinion here expressed by Mr. Preston is at variance with that of Mr. Fearn. In the *Essay on Contingent Remainders*, p. 289, he says, " That a contingent estate cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by way of estoppel by fine, (or recovery,) appears by *Weale v. Lower*, and *Vick v. Edwards*." In the seventh edition of that work by Mr. Butler, 366, this position is stated in a note. [A contingent remainder may, before it vests, be passed by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency,] but upon this head see Mr. Preston's *Treatise on Conveyancing*. The part within the brackets is in the text of Fearn, and it is introduced in the note as the legal position established by the section to which it applies. In the same edition, 366, it is said, that a contingent remainder cannot be passed or transferred by a conveyance at law before the contingency happens, otherwise than by way of estoppel by fine or by recovery where the contingent remainder-man comes in by voucher, appears by *Weale v. Lower*, and *Vick v. Edwards* ; but contingent estates, it seems, are assignable in equity. In the edition of Gilbert on Uses, by Sugden, p. 124, there is the following note by the editor: " It should seem that it may still be considered clear that a fine in fee of a contingent estate will operate to pass it to the conusee by estoppel."



The opinions of text writers being so much at variance, it becomes necessary to examine the authorities on which they severally rely in support of those opinions. Mr. Preston relies on *Weale v. Lower*, and upon what he calls the sixth resolution in *Buckler's case*, 2 Co. 56 a. But this should rather be called an extra-judicial dictum; for it was not one of the points resolved, nor did the facts of the case raise it. It is as follows: "Sixthly, it was said if disseisee levy a fine to a stranger, that in this case the disseisors shall retain the land forever; for the disseisee against his own fine cannot claim the land, and the conusee cannot enter; for the right which the conusor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseisor shall take advantage. In *Weale v. Lower*, Pollexf. 54, the same doctrine is held by Lord Hale; but the case there in judgment did not fall within it. There a contingent remainder-man in tail, who had also the remainder in fee, levied a fine to the use of J. S. for 500 years, and died before the contingency happened: upon his death the remainder in fee descended upon his heir; and whether J. S. had right for the 500 years against such heir was the question. This depended upon the point whether the fine destroyed the contingent remainder; and it was held that it did not, because the fine was for years only; but Hale, C. J., said, had the fine been levied in fee. it would have destroyed the contingent use, barred the heir, and enured and operated to the benefit of the possessor (Ferne, 366,) as the fine of the disseisee to a stranger; but he had the case debated again. Those authorities are relied upon to show that a fine in fee destroys a contingent remainder; but there are authorities the other way. March, 105, pl. 180, is at variance with the dictum in *Buckler's case*. (Tr. 17 Car. 1.) The case is as follows: "Disseisee levieth a fine; by *Reeve and Crawley*, it shall not give right to the disseisor, because this fine shall enure merely by way of estoppel, and estoppels bind only *privies* to them, and not a stranger, and therefore the disseisor shall not take benefit of it, and therefore they did conceive 2 Co. 56 a. to be no law." If a disseisin be unknown to disseisee, a fine by him shall not enure to the benefit of the disseisor. In *Fitzherbert v. Fitzherbert*, Cro. Car. 484, it was moved if disseisee, not knowing of the disseisin, had levied a fine to a stranger, whether that should have barred his right, and enured to the benefit of the disseisor, according to 2 Co. 56 a., *Buckler's case*, which, if admitted, would be of very mischievous consequence. But herein the Court delivered no opinion; but *Bramston*, C. J., and myself (*Croke*) conceived it should not enure to the benefit of the disseisor, but to the use of the conusor himself; for otherwise a disseisin being secret may be the cause of disinherison of any one who intends to levy a fine for his own benefit, for assurance of his lands upon his wife and children, or otherwise." The doctrine whether a fine by disseisee shall enure to the benefit of the disseisor is adverted to and considered questionable in Co Litt. 49 a. n. 4; Goulds. 162; 1 Roll. Abr. Estoppel, (E.) pl. 3, and *Williams v. Thomas*, 12 East, 141. In note 320, to Co. Litt. 49 a. n. 4, *Buckler's case* is referred to, and it is said, "Fine by disseisee extinguishes his right, and shall enure to the disseisor. But see this denied, M. 13 Car. B. R. Crook, n. 7; *Fitzherbert's case*, Hal. MSS." In Gouldsbrough, 162, *Coke*, attorney-general, demanded this question of the Court, — If there be disseisor and disseisee, and during the disseisin the disseisee, when he has nothing but a right, levies a fine to a stranger, if by this fine the right of disseisee be

gone, and if the disseisor shall take advantage thereof? *Popham and Gawdy*. Nay, truly." In Roll. Abr. Estoppel, (E,) pl. 3, this is laid down, — If disseisee suffers recovery to the use of D., this shall be a good recovery by estoppel to bind disseisee and his heirs." If baron and feme be tenants in special tail, husband discontinues and dies, and the wife levy a fine without entering, the fine fortifies the discontinuance, and the wife cannot enter to be remitted, for the statute 32 H. 8 only avoids the discontinuance by the wife's entry, *Moore's case*, Palmer, 365; 2 Roll. 312. In *Wright v. Wright*, 1 Ves. 412, Lord *Hardwicke* lays it down that in law an heir may levy a fine in the life of his ancestor, which will bind by estoppel after descent to him. In the same case Lord *Hardwicke* says, "The reasons of the law's not allowing such a disposition which this court (a court of equity) will, are mostly very refined;" and Lord *Cowper* says in *Thomas v. Freeman*, 2 Vernon, 563, such notions would not have prevailed now. In *Williams v. Thomas*, whether a fine by disseisee should enure to the use of the disseisor was raised as a question in argument; but the question was not decided, because the court thought that there had been no disseisin; and Lord *Ellenborough* discusses the point what is a disseisin, and what he says as to disseisin is equally applicable to a case of intrusion or abatement. The true principle seems to be laid down in *The Earl of Peterborough v. Bludworth*, 1 Lev. 128. There, in ejectment before *Bridgman*, C. J., it appeared that disseisee levied a fine, and declared the use by deed to conusee. *Bridgman* held this should not enure to the use of the disseisor; but had no use been declared, it should have enured to the use of the disseisor, and should have extinguished the right of the disseisee, and this was intended to have been found specially; but the jury gave their verdict at large against the direction of the court. *Bridgman*, therefore, was of opinion, that if no use had been declared, the fine would have enured to the use of the disseisor, and extinguish the right of the disseisee; but the use being declared, showed the intent that it should not enure to the use of the disseisor. And this agrees with *Vick v. Edwards* and *Davies v. Bush*. In *Vick v. Edwards*, 3 P. Wms. 372, lands were devised to two trustees, and the survivor of them, and the heirs of such survivor, in trust to sell; and upon its being objected that the parties could not make a good title, because the fee-simple was not in the trustees, but was limited to the survivor, and it was uncertain who would be the survivor, Lord *Talbot* held that the trustees, joining in a fine, would pass a good title to purchaser by way of estoppel; that the fee was in abeyance, and it was certain that one of the two trustees must be the survivor, and entitled to this future interest, consequently his heirs would be estopped by reason of the fine levied by their ancestor, to say, "*partes finis nihil habuerunt*," although he that levied the fine had no interest. Lord *Talbot*, therefore, was of opinion that the trustees who had a contingent remainder might transfer that remainder, and make a good title by the operation of a fine.

In *Davies v. Bush*, 1 M'Clelland & Younge, 58, A. was tenant for life under a settlement, remainder to his wife for life, remainder to their children, with ultimate remainder to the survivor of them in fee: they mortgaged in fee to L. and R., and levied a fine to the use of the mortgagee and his heirs during the lives of A. and wife and the survivor, remainder to the uses mentioned in the settlement, remainder to the mortgagee in fee. It was decided, that the contingent remainder in the

survivor was not destroyed by the fine, because it was controlled and limited by the deed which led the uses, which showed unequivocally that the parties only meant to give the mortgagee a security, and had no intention to affect any of the limitations in the original settlement; but that the fine, uncontrolled by the deed, would have destroyed them. These authorities show, that a fine in fee will not extinguish a contingent remainder, when a contrary intention is apparent.

The contrary opinion proceeds on the doctrine of estoppel. Co. Litt. 352 a, shows, that every estoppel must be reciprocal that is to bind both parties, and that is the reason that, regularly, a stranger shall neither take advantage of, nor be bound by, the estoppel; but privies in blood, as the heir, and privies in estate, as the feoffee, lessee, &c.; privies in law, as the lord by escheat, tenant by the courtesy, tenant in dower, the incumbent of a benefice, and others that come in under by act in law, or in the post, shall be bound by and take advantage of estoppels: and Coke, in his twenty-first reading on fines, says, "Estoppel is reciprocal on both sides; for he that shall not be concluded by a record or other matter of estoppel, shall not conclude another by it; and yet in our books the king estops the successor from saying that M. had nothing in the land, by reason that M. held of the king, and levied a fine to his predecessor sur consance de droit come ceo quil ad de son don, and though the king were a stranger to it, and had nothing but this seigniorship out of the land, yet the king took advantage of this estoppel. The reason for this seems to be the prerogative of the king, whereof I shall not speak; but otherwise it is in the case of a common person, as 22 Ed. 3, 17, and 40 Ed. 3, 30, are agreed. See 41 Ed. 3, by Finch, that a stranger shall be concluded by a fine levied sur consance de droit come ceo quil ad de son don." But this seems a mistake in Co., for I find no case of the kind; and in 40 Ed. 3, 30, where it was argued that a fine should not bar, because the person against whom it was urged was a stranger to the person who levied the fine, *Finchden* says, "Certainly he may well counterplead against the fine, because he is not privy to the fine. At the end of the report is a note, 'a stranger to a fine, or other matter of record, shall not be estopped.'" Concordat An. 38 Ed. 3, fo. 28. 12 Ed. 4, 13, per Fairfax. 11 H. 4, 1, 82. 42 Ed. 3, fo. 20. And in Brook. Abr. Estoppel, 216, it is said, a stranger to a fine shall not plead it for estoppel.

If the fines by Agnes and Grace destroyed their remainders, (it being uncertain, when their fines were levied, whether they would ever be entitled to any thing in this estate,) it must be upon technical reasoning and technical grounds only; and let us see, then, whether technical reasoning and technical grounds, as well as sound sense and correct legal principles, do not lead to a contrary conclusion. Upon the death of Peggy Hoblyn, the only possible claimants would be the heir-at-law of Hooper Martyn (Thomas Elliot) or Agnes and Grace, or the persons claiming under their fines. The heir-at-law would be met by Hooper Martyn's will, because that gives away the whole estate to the surviving children of Elliott and Parnall. He must then rely upon the fines of Agnes and Grace, and then he is met by this dilemma: those fines either did operate, or they did not; they either passed the rights of Agnes and Grace, or they did not. If the fines operated and passed the rights, the rights are in the persons claiming under those fines; if they did not operate and pass the rights, the rights still remained in Agnes and Grace. To extricate himself from this dilemma, the heir must insist that Agnes and Grace

are estopped from saying that their fines did not operate, and that nothing passed, but unless he is estopped, he cannot say they are estopped, because estoppels are reciprocal. And if he be estopped from saying that the fines did not pass the right to the conusees, the persons claiming under the fines of Agnes and Grace are entitled against him. But is it true that Agnes and Grace are estopped as against him? A fine bars by estoppel parties and privies, and parties and privies may avail themselves of such estoppel; but can a stranger insist upon it? and the heir-at-law is a stranger to this fine. As against the parties claiming under their fines, Agnes and Grace may be estopped; but it does not follow that they are estopped as to strangers; and Co. Litt. 352, is an authority that they are not.

The heir-at-law, therefore, would, as it seems to me, be barred by the subsisting right of Agnes and Grace, and would be unable to resist a claim in their names. Suppose a claim to have been made upon Peggy's death in the names of Agnes and Grace, could that have been resisted by a stranger? According to the true state of the case, the *veritas facti*, the right, would have been in them: their fines had not passed it from them. Had their claim been resisted by the persons claiming under the fines, they might have been estopped as against them; but their claim would have been defeated, not because the right was not in them, but because they were estopped by their own fines, as against the parties and privies to those fines, from saying they had not passed away the right. Upon a resistance to their claim by a person not entitled to insist upon the estoppel, it seems to me their claim must have prevailed. The true state of the law upon this point I take to be this, — that a fine by a contingent remainder-man passes nothing, but leaves the right as it found it; that it is, therefore, no bar when the contingency happens, in the mouth of a stranger to that fine, against a claim in the name of such remainder-man; that it operates by estoppel, and by estoppel only, and that parties or privies may avail themselves of that estoppel, but parties or privies only. That being the case, the lessors of the plaintiffs are entitled to recover the two ninths which belong to Agnes and Grace, as well as the remaining seven ninths of the estate.

Postea to the plaintiff.

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GIBBS v. SAMUEL STEAD and W. REED. — p. 528.

The statute 38 G. 3, c. 5, s. 9, enacts, that the collectors of the land-tax shall levy and collect the rates assessed, according to the intent of that act; and they are required to demand all sums of money taxed and assessed of the parties themselves, as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment. Sect. 17 enacts, that if any person shall refuse or neglect to pay any sum of money whereat he shall be assessed upon demand by the collector, it shall be lawful for the collector to distrain, &c. A collector having made a demand of the land-tax upon the premises charged at a time when the party liable to pay was absent from home, and not upon the party himself, and distrained immediately after making such demand, the distress was held to be unlawful: for that before he distrained he was bound to allow a reasonable time to elapse after the demand made, in order that the party liable to pay the tax might have an opportunity of complying with the demand.

By sect. 2, the sum therein mentioned is to be levied within the year; and by sect. 19, it is enacted, that the fourth part of that sum, for the first quarterly payment, shall be

levied on or before the 24th day of June, 1798; that the same sum, for the second quarterly payment, shall be levied before the 29th of September, 1798; the like sum, for the third quarterly payment, on or before the 25th day of December, 1798; and the like sum, for the last of the quarterly payments, on or before the 25th day of March, 1799. Semble, That the sums due for the last quarterly payment may be levied by the collector at any time during the current quarter.

TRESPASS for breaking and entering the plaintiff's house, and seizing his goods. Plea, not guilty. At the trial before *Doyley*, Serjt., at the Spring assizes for the county of Surrey, 1828, it appeared that the defendant Stead was collector of the assessed and land taxes for the south division of the parish of St. George, Southwark: the other defendant, Reed, was a broker. On the 22d of March, 1827, the two defendants went to the plaintiff's house when he was absent from home, and demanded the payment of 2*l.* 11*s.* for two quarters' taxes, viz: 1*l.* 17*s.* for assessed taxes, and 14*s.* for land-tax. They were informed by the servant of the plaintiff that he was not at home; but they entered the house, made an inventory of his goods, and left a man in possession. There was not sufficient proof of service of notice of action on the defendant Stead. The defendants put in a warrant of the commissioners of taxes for the borough of Southwark, authorising the defendant Stead, as collector of the land-tax, to levy the land-tax by four equal quarterly payments; (that is to say,) the first quarterly payment on or before the 24th day of June next ensuing; the second quarterly payment on or before the 29th day of September next ensuing; the third quarterly payment on or before the 25th day of December next ensuing; and the fourth quarterly payment on or before the 25th day of March, which would be in the year 1827."

It was contended on the part of the plaintiff, that the land-tax for the quarter ending on the 25th of March was not due until that day, and that the defendants having distrained for that quarter's land-tax, the distress was unlawful; and, secondly, that they had no right to distrain, either for the assessed (a) or the land-tax (b) until there had been a neglect or refusal of payment by the plaintiff: and that there was no evidence of such a refusal in this case, as the plaintiff was absent from home when the demand was made, and the defendants had not allowed a reasonable time to elapse between the demand and the making of the distress, so as to enable him to make the payment required. The learned Serjeant doubted whether the land-tax distrained for was due; but he was clearly of opinion that the distress was unlawful, upon the ground that the defendants had not, after they had made the demand of the taxes upon the premises, allowed a reasonable time for the plaintiff to pay the same: there was no refusal or neglect, therefore, by the plaintiff to pay before the distress was made; and the jury, under his direction, found a verdict for the plaintiff, but liberty was reserved to the defendants to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

(a) By sect. 33 of the 43 G. 3, c. 99, it is enacted, "that if any person or persons shall refuse to pay the several sum and sums charged upon him, her, or them by any act or acts granting the duties herein mentioned, or any other duties to be assessed under the regulations of this act, upon demand made by the collector or collectors of the division or place, according to the precepts or estreats to him or them delivered by such commissioners, it shall be lawful for such collectors, who are hereby respectively thereunto authorized and required, for non-payment thereof, to distrain upon the messuages, lands," &c.

(b) By sect. 2 of the 38 G. 3, c. 5, it is enacted, "that the sum of 1,989,673*l.* 7*s.* 10*d.* shall be raised, levied, and paid to his majesty within the space of one year from the 25th day of March, 1798, and shall be assessed in the several counties, &c."

*Broderick* showed cause. At the time when the defendants distrained, the last quarter's land-tax was not due. By the warrant of the commissioners, which is founded on the stat. 38 G. 3, c. 5, the defendants were authorised to levy the land-tax by four equal quarterly payments: the times of payment were those specified in the twelfth section of that statute. The land-tax for the last quarter did not, according to that section, become due until the 25th of March, so that on the 22d of that month they levied for more than they had a right to do, and the distress was, therefore, unlawful. But, secondly, assuming that the whole sum claimed by the defendants was due, the distress was unlawful, because they had no authority to distrain for the land-tax under the stat. 38 G. 3, c. 5, or for the assessed taxes under the 43 G. 3, c. 99, until there had been a refusal or neglect to pay by the plaintiff. The defendants went to the plaintiff's house when he was absent, demanded payment of the taxes, and distrained, without giving him any opportunity of complying with the demand. There was not, therefore, any neglect or refusal to pay within the meaning of the acts of parliament.

*Hutchinson*, contra. The whole sum for which the defendants distrained was due on the 22d of March. The 38 G. 3, c. 5, s. 2, enacts, that the entire sum therein mentioned shall be raised, levied, and paid within the space of one year from the 25th day of March, 1798. By section 9, the collectors are required to levy and collect all and every the taxes assessed and charged, and to demand the sums which shall be so taxed and assessed of the parties themselves, if they can be found, or else at the place of their last abode, or upon the premises charged with the

of England, Wales, and Berwick-upon-Tweed, according to the proportions therein mentioned."

Section 9 enacts, that the persons appointed by this act to be collectors "shall levy and collect all and every the rates and taxes so assessed and charged, according to the intent and direction of this act; which said collectors are hereby required to demand all and every the sum and sums of money which shall be so taxed and assessed of the parties themselves as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment; and the said several collectors shall collect and levy the said moneys so charged for his majesty's use, and are hereby required and enjoined to pay unto the receivers general, or their deputies, all and every the said rates and assessments by them respectively collected and received, at such time or times, place or places, as the said commissioners, or any two or more of them, shall appoint; so as the whole sums due for each quarterly payment shall be paid or answered by the said collectors to the receivers general, or their deputies respectively, upon the days and at the times by this act appointed for payment thereof."

Section 12 enacts, that the sum of 497,418*l.* 6*s.* 11*d.* and nine-sixteenth parts of a penny, for the first quarterly payment of the said assessments, shall be levied and paid unto the receivers general of the said several counties, &c., on or before the 24th day of June, 1798; the like sum for the second quarterly payment, on or before the 29th September, 1798; the like sum for the third quarterly payment on or before the 25th day of December, 1798; and the like sum for the last of the said quarterly payments on or before the 25th day of March, 1799.

Section 17, after reciting that doubts had arisen touching the authority of collectors to distrain for non-payment of the land-tax, under the warrants usually granted by commissioners at the time of their appointments, enacts, "that if any person shall *refuse or neglect* to pay any sum or sums of money, whereat he or she shall be rated or assessed by this act, upon demand by the said collector or collectors of that place, according to the precepts or estreats to him or them delivered by the said commissioners; that then, and in all and every such case and cases, it shall be lawful for the said collectors, or any of them, and they are hereby authorised and required to levy the sum assessed by distress and sale of the goods and chattels of such person *so neglecting or refusing* to pay, or distrain upon the messuages, lands, tenements, and premises, so charged with any such sum or sums of money, without any further authority from the commissioners for that purpose."

assessment; and the collectors are to pay the rates and assessments received by them to the receivers-general, or their deputies, at such times as the commissioners shall appoint, so as the whole sums due for each quarterly payment shall be paid *by the collectors to the receivers-general*, or their deputies respectively, upon the days and at the times by that act appointed for payment thereof. By section 12, the last of the four quarterly payments is required to be made *by the collectors* to the receiver-general *on or before the 25th of March, 1799*. The collectors must, by necessary implication, have had authority to collect those rates for that quarter before the 25th of March, because the fourth instalment was payable on or before that day to the receiver. Then as to the other point, it is insisted that a demand on the individual ought to have been made before the distress. The warrant directs the defendants to levy: they have complied with the warrant. By section 17, it is enacted, that if any person shall refuse or neglect to pay, any sum whereat he shall be rated, upon demand by the collector, then they are authorised to levy the sum assessed by distress. Now in this case the defendants went to the plaintiff's house. The demand on the servant was sufficient. The act authorises a demand, either on the individual, or at the last place of abode, or on the premises charged. It is the duty of a person liable to pay taxes, as soon as they become due, to leave a sufficient sum on the premises to pay them whenever they are demanded.

BAYLEY, J. I think that the direction of the learned serjeant upon the point decided by him was right, and that the rule for entering a non-suit ought to be discharged. I have no doubt that the land-tax assessment for the last quarter ought to be considered as having become due at any period in the current quarter which ended on the 25th of March. The collector must necessarily have the power of completing the collection of all the sums due in that quarter before the 25th of March; for he is bound to pay to the receivers-general the whole sum payable for that quarter on or before that day. The land-tax for the quarter ending on the 25th of March was, therefore, due on the 22d, when the distress in question was made, and there is no objection to the distress on the ground that the sums distrained for were not due. But I am of opinion that the distress in this case was unlawful, because the demand not having been made on the party himself from whom the taxes were due, there ought to have been an interval between the demand and the seizure, so as to allow the plaintiff an opportunity of paying the sum demanded. The statute 38 G. 3, c. 5, s. 9, requires the collectors to demand all sums taxed and assessed of the parties themselves, as they shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment. If the demand be made on the premises charged with the assessment, there ought to be between the demand and seizure a reasonable interval of time, sufficient to allow the party an opportunity of paying the sum required. Here the collector went to the plaintiff's house in his absence, demanded the taxes; and they not having been paid upon such demand, immediately distrained. Now the seventeenth section, in case of any neglect or refusal to pay taxes upon *demand* made by the collectors, authorises them to distrain. The demand mentioned in that section must be such a demand as is mentioned in the ninth section. It must, therefore, be a demand, either on the party himself, or at the last place of his abode, or upon the premises charged; and if the demand be made on the premises charged, there ought to be between the demand and the seizure an interval of time sufficient to admit of the party making the payment required. To hold that

a distress might be put in immediately after a demand made on the premises, in the absence of the owner, would be a very harsh construction of the act, and might be attended with great inconvenience in many cases; for poor persons, who are under the necessity of leaving their houses in the day-time to work, might in their absence have their goods seized. Then as to the assessed taxes, the 43 G. 3, c. 99, s. 33, enacts, that if any person shall refuse to pay the sums charged, upon demand made by the collectors, it shall be lawful for the collectors to distrain. In order to authorise a distress under that statute, there must be a previous demand by the collector, and a refusal by the party. There has been no refusal in this case. If before the defendants distrained, they had waited a reasonable time, and the money demanded had not been paid, the neglect to pay after such a demand might have been evidence of a refusal within the meaning of the act of parliament. If the party liable had been at home at the time when the taxes were demanded, and knew that the demand had been made, the neglect to pay would have been evidence of a refusal; or if the collector had called once, and given notice that he would come again on the following day, and the money was not then left, that would have been evidence of a refusal. But where the demand is made, not on the individual, but on the premises, at a time when the occupier is absent from home, and a reasonable time is not allowed to elapse after the demand made, so as to enable him to comply with the demand, the non-payment of the taxes in that case is not evidence of a refusal; and if there was no refusal or neglect to pay, the distress was unlawful. The rule for entering a nonsuit must, therefore, be discharged.

HOLROYD, J. Before the defendant could have any right to distrain, there ought to have been a default of payment upon or after demand made. The statute 38 G. 3, c. 5, s. 9, requires the collectors to demand the sum assessed of the parties *themselves*, as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment. Here the demand was not made on the party himself, but on the premises charged with the assessment. Until some default was made by the plaintiff there was no ground for making a distress. Until the plaintiff had had an opportunity of complying with the demand made by the collectors, there could not have been any default. The plaintiff was absent from home when the demand was made; he had no opportunity given him of complying with that demand before the distress was made, and had not been guilty of any default. The distress was, therefore, unlawful, and the plaintiff is entitled to recover.

LITTLEDALE, J. I am of the same opinion. I think that at the time when the distress was made the land-tax was due for the two quarters, and that the collector before the end of the current quarter was authorised to demand payment, and, upon refusal, to distrain: but in order to justify the collector in making a distress, there ought to have been some previous default in the plaintiff. There was no default in this case. The demand was made on the premises charged with the assessment at a time when the occupier was absent. He ought to have had an opportunity of complying with the demand, and a reasonable interval of time ought to have been allowed him for that purpose. If after such an interval had elapsed he had not paid, he would have been guilty of a default. Or if in this case he had been at home, and promised to pay the sum demanded at a certain time, and had failed in so doing, he would have been guilty of a default. But he was not at home when the demand was made, and



not having had any previous notice that the collector would call for the taxes, he was not bound to have left on the premises money sufficient to pay them. I think that some interval of time, varying according to the circumstances of the case, ought to be allowed, after the demand made, to make the payment required, before a distress can lawfully be made. The defendants in this case distrained immediately after they had demanded the taxes. The distress was, therefore, unlawful, and this rule must be discharged.

Rule discharged.

CHARLES BROOKE v. THOMAS NOAKES. — p. 537.

In an action founded on the statute 11 G. 2, c. 19, s. 3, against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant.

Semble, That the statute is so far penal, that it is incumbent, in an action by the landlord against a third party, for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section.

DECLARATION in debt on the statute 11 G. 2, c. 19, stated, that on the 29th September, 1822, the plaintiff demised to one G. Meers a messuage or tenement, with the appurtenances, and also certain closes of land in the county of Kent, habendum from year to year at a yearly rent; that 735*l.* 2*s.* 9*d.* of the rent was in arrear; that certain cattle, goods, and chattels of Meers being upon the premises, and liable to be distrained for the said arrears of rent, Meers fraudulently removed and carried away the cattle, &c., from off the demised premises, with intent to prevent the plaintiff from distraining the same for the rent aforesaid; and that the defendant unlawfully and knowingly aided and assisted Meers in the said fraudulent carrying away and removing of the said cattle, &c., and in keeping and continuing the said cattle, &c., so conveyed away and removed away as aforesaid, with intent to prevent the same from being distrained for the said rent so being due, payable, and in arrear, contrary to the statute. Averment, that the cattle were of the value of 1000*l.*, whereby and by force of the statute an action had accrued to the plaintiff to demand from the defendant 2000*l.*, being double the value of the said cattle, &c. Plea, nil debet. At the trial before *Burrough, J.*, at the Spring assizes for the county of Kent, 1823, it was proved that Meers was tenant to the plaintiff of the premises mentioned in the declaration, and that the rent was in arrear; that in August, 1826, the rent charged in the declaration was due to the plaintiff from Meers; that he then had upon the farm five cows, (which were usually milked by his wife,) and upwards of 200 sheep. On Saturday, the 2d of September, the plaintiff called on Meers, and pressed him for payment of the rent. Meers on that occasion said that the defendant would take his stock at a fair valuation. The defendant's farm was at a distance of two miles from that of Meers. On Sunday, the 3d of September, the cows, sheep, and goods of Meers were removed from his farm. The cows were driven by one Rickwood, who married the defendant's sister, and lived upon his farm with him. The marks on Meer's sheep were G. M.; but after they were removed to the defendant's premises, they were marked T. N. On the 8th of September the wife of Meers was seen milking his cows upon the defendant's premises. The learned Judge told the jury, that there was decisive evidence to show

that Meers had fraudulently removed his stock and goods with intent to prevent the landlord from distraining the same; but that it was incumbent on the plaintiff to prove that the defendant aided and assisted Meers with that intent. There was no evidence of any act done by the defendant with that intent. It was not even proved that he had ever seen Meers's cattle upon his premises; nor was there any evidence that he knew that the cattle had been removed to his premises for the purpose of preventing the landlord from distraining them. The jury having found a verdict for the defendant, a rule nisi was obtained for a new trial, upon the ground that the verdict was against evidence. *Lister v. Brown*, 3 D. & R. 501, and *Stanley v. Wharton*, 9 Price, 301, were cited.

*Theiger* now showed cause. The statute 11 G. 2, c. 19, s. 1, enacts, "that if any tenant, &c., shall fraudulently or clandestinely convey away or carry off the premises his goods, to prevent the landlord from distraining the same for arrears of rent, it shall be lawful for the landlord, within thirty days after such conveying away or carrying off such goods, to distrain;" and section 3 enacts, "that if any tenant shall fraudulently remove or convey away his goods, or if any person shall wilfully and knowingly assist such tenant in such fraudulent conveying away or carrying off of any part of his goods, or in concealing the same, he, the person so offending, shall forfeit and pay to the landlord double the value of the goods by him carried off or concealed." Section 3 not only creates a duty where none existed before, but also makes the breach of that duty an offence, and subjects the third party to a penalty, viz., the payment of double the value of the goods removed. This statute is remedial, so far as it extends the remedy of the landlord against the tenant, but it is highly penal as it affects third parties. A party who seeks to recover the penalty must show by strict proof that the defendant has committed an offence within the meaning of that section. The offence imputed to the defendant is, that he wilfully and knowingly assisted Meers in the fraudulent carrying away of his goods. To bring the case within the third section, the plaintiff ought to have proved, not merely that there was a fraudulent removal by the tenant himself, but that the defendant, the person assisting in the removal, was privy to that fraudulent intent with which the removal was made. *Bach v. Meats*, 5 M. & S. 200, shows that the third section is confined in its operation to cases falling within the first. There was not in this case any satisfactory evidence to show that the defendant was privy to the fraudulent intent of Meers when he removed the goods to the defendant's premises, and therefore the verdict was right. In *Lister v. Brown*, 3 D. & R. 501, Carr. & Payne, N. P. C. 121, the action was against the tenant for removing the goods, and against his son for assisting in such removal. The goods were, in fact, removed by the son. It was objected, that it was not a case within the statute, because the removal was not the act of the tenant, but of a third party. The jury having found that the removal by the son was with the privity of the father, the Court, on motion for a new trial, thought that the act of removal by the son under those circumstances must be considered the act of the father; and, consequently, that the removal was made by the tenant, and that the other defendants assisted him in such removal. *Stanley v. Wharton*, 9 Price, 301, 10 Price, 138, shows that circumstances of suspicion may be laid before a jury to show a fraudulent co-operation by a third party. Here all the evidence tendered by the plaintiff was received; but there was none to show that the defendant was cognisant of the fraudulent intent of the tenant.

*Bolland* and *C. Law*, contra. The statute 11 G. 2, c. 19, s. 3, is a remedial statute, *Lister v. Brown*, *Stanley v. Wharton*. So the statute 29 Eliz. c. 4, which subjects a sheriff, who takes larger fees than allowed by that statute, to an action for treble damages, at the suit of the party aggrieved, has been held to be a remedial, and not a penal statute, *Woodgate v. Knatchbull*, 2 T. R. 148. That being so, there was ample evidence in this case to show that the defendant aided and assisted Meers in the fraudulent removal or concealment of his goods, and that he did so with intent to prevent the plaintiff from distraining them. The cattle were removed to the defendant's lands, and were driven there by his brother-in-law. The cows while on his lands were milked by the wife of the tenant. That was proof of continued ownership by Meers; and the cattle having remained upon the defendant's land, he must have known from Meers for what purpose they were removed. At all events there was sufficient evidence of such a concealment as the sheep were capable of; they were mixed with the defendant's sheep, and their marks were changed. It ought to have been left to the jury upon these facts, Whether the defendant was privy to the fraudulent removal by the defendant, and concurred in it?

BAYLEY, J. I think that the verdict in this case was right. The statute 11 G. 2, c. 9, s. 3, is remedial as well as penal. It is remedial so far as it enlarges the remedy which the landlord had against his tenant; but it is so far penal that the landlord who seeks to visit a third party with the penal consequences of the act, must bring the case, by strict proof, within the words of the enacting clause. It ought to have been proved, therefore, not only that the defendant assisted in the removal or concealment of the goods, but that he gave assistance with the intent to prevent the landlord from distraining. Now, here there was no evidence which ought to have satisfied the jury that the defendant assisted in the removal of the cattle. If the fact were so, it might have been proved by Rickwood; but the plaintiff did not call him. But, independently of that, I think that the defendant ought not to be visited with the penal consequences of this act of parliament, unless it be distinctly shown that he was privy to the fraudulent intent with which the tenant's cattle were removed. Assuming, therefore, that the defendant assisted in the removal or concealment of the property, there was no evidence that he did it with the fraudulent intent to prevent the landlord from distraining. Upon this evidence the verdict was properly found for the defendant. The rule for a new trial must, therefore, be discharged.

HOLROYD and LITLEDALE, Js., concurred.

Rule discharged.

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CHATFIELD v. PARKER and COTTERELL. — p. 543.

Trespass for mesne profits. Plea, a judgment recovered by defendant in 1822, against A.; an elegit sued out thereon; an inquisition held, whereby it was found that A., at the time when the judgment was recovered, was seised for life of (inter alia) the premises mentioned in the declaration, and that the sheriff delivered those premises to the defendant. Replication, that in 1820, A., by indenture, bargained and sold, inter alia, the premises mentioned in the declaration to the plaintiff; that he entered and continued in possession until the committing of the trespasses. The defendant cravedoyer of the indenture; and it thereby appeared, that for the purpose of securing an annuity to B., A., in 1819, had conveyed the premises in the declaration mentioned to

B. for 100 years, and that subject thereto he conveyed them to the plaintiff for better securing a second annuity granted by the deed. Upon demurrer, the replication was held to be good, inasmuch as it showed that the plaintiff was in possession at the time when the trespass was committed; that A. had no interest in the premises at the time when the judgment was obtained against him; that the defendant, consequently, could derive no title from him, and was a wrongdoer.

TRESPASS for breaking and entering the manors of Budbrooke and Keckthorne, and ten messuages, &c., in the county of Warwick, and ejecting and expelling the plaintiff from his possession and occupation thereof, and keeping possession and taking the issues and profits. Plea, as to entering the tenements in the declaration mentioned, and ejecting, expelling, and amoving the plaintiff from his possession of a moiety of the said tenements; that Parker, in Hilary term, 1822, recovered a judgment in the King's Bench against the Right Honorable John Evelyn Pierrepont Dormer, Lord Dormer, for 400*l.*; and that the defendant, Parker, for obtaining execution of the said judgment, sued out of the King's Bench an *elegit* upon the judgment, directed to the sheriff of Warwickshire; that by an inquisition held on, &c., at, &c., it was found that Lord Dormer was seised in his demesne for his life of (*inter alia*) the premises in the declaration mentioned, which, together with other land in the inquisition mentioned, were a moiety of the lands of the said John E. P. Lord Dormer, in the sheriff's bailiwick, which said moiety the sheriff caused to be delivered to the defendant, Parker, to hold as his free tenements. The plea then stated, that in due execution of the writ sued out by Parker, the other defendant, Cotterell, in aid and assistance of the sheriff, and as his bailiff, and by his command, on the said 13th of June, 1823, entered the tenements in the declaration mentioned, and ejected and expelled the plaintiff, and put Parker into, and Parker accordingly took possession of a moiety thereof, the same being part of the tenements in the inquisition mentioned, and kept and continued the plaintiff so expelled, &c., as was lawful for the cause aforesaid. Replication, that the said Lord Dormer being seised in his demesne for his life of and in the tenements, with the appurtenances in the declaration mentioned, before the day of giving judgment in the plea mentioned, to wit, on the 14th of March, 1820, by an indenture then made between the said Lord Dormer of the first part, W. S. and J. C. of the second part, and the plaintiff of the third part, granted, bargained, sold, and demised to the plaintiff, his executors, &c., amongst other things, the premises mentioned in the declaration; habendum to the plaintiff, his executors, &c., for the term of 200 years from the day next before the date of the indenture; that the plaintiff entered and became possessed for the said term, and continued so possessed thereof until the defendants entered under color of the *elegit*.

The defendants first cravedoyer of the indenture, (which was set out.) and by that indenture it appeared that it was made between the Right Honorable Evelyn Pierrepont, Lord Dormer, Baron Dormer, of Wenzel, in the county of Buckingham, of the first part; W. S., of St. Andrew's Hill, London, and J. Coope, of Osborne-street, in the county of Middlesex, two of the directors of a society called the Pelican Life Insurance Company, and acting on the part of the same society, of the second part; and Charles Chatfield, (the plaintiff,) of Angelcourt, of the third part. It then recited, that by an indenture of the 18th June, 1819, made be-

tween the said Evelyn Pierrepont, Lord Dormer, of the first part; W. S. and J. C. of the second part; and T. Dawes of the third part, in consideration of 14,998*l.*, paid to the said E. P. Lord Dormer out of the funds and on behalf of the society or partnership in manner therein mentioned, he, the said E. P. Lord Dormer, did grant, &c., unto the said W. S., and J. C., their executors, &c., an annuity of 1725*l.*, to be paid and payable for ninety-nine years, to be computed from the day next before the date of the indenture, and thenceforth if the said E. P. Lord Dormer should so long live, to be charged and chargeable upon, and payable out of (inter alia) the premises mentioned in the declaration, habendum for ninety-nine years, and thenceforth if the said E. P. Lord Dormer should so long live, and that the said E. P. Lord Dormer did grant, bargain, sell, and demise unto the said T. Dawes, his executors, &c., (inter alia,) the premises mentioned in the declaration, habendum to Dawes, his executors, &c., for 100 years, to be computed from the day next before the date of the said indenture, if the said E. P. Lord Dormer should so long live, in trust to pay the said annuity out of the rents and profits, &c. It then recited, that the said E. P. Lord Dormer had contracted and agreed with the said W. S. and J. C., for the absolute sale to the said W. S. and J. C., as two of the directors of the said Pelican Life Insurance Company, on behalf of the company, of an annuity of 800*l.*, to be paid to them, W. S. and J. C., their executors, &c., for ninety-nine years, to be computed from the day next before the date of the indenture of the 14th March, 1820, if the said E. P. Lord Dormer should so long live, at and for 6998*l.*, and that in pursuance of the said agreement, they, W. S. and J. C., had paid that sum to the said E. P. Lord Dormer; and that upon the treaty for the purchase of the said annuity of 800*l.*, it was agreed that the annuity of 1725*l.*, and all powers, remedies, and trusts for securing the same, should be ratified and confirmed, and subject thereto, that the said annuity of 800*l.* should be charged upon (inter alia) the premises mentioned in the declaration. The indenture then witnessed, that in pursuance of that agreement, he, the said E. P. Lord Dormer, had ratified and confirmed the annuity of 1725*l.*, granted by the indenture of the 18th June, 1819, and that in pursuance and further performance of the said agreement, and in consideration of the sum of 6998*l.*, paid to him by W. S. and J. C., as thereinbefore mentioned, he, the said E. P. Lord Dormer, had granted, bargained, sold, and confirmed to W. S. and J. C., their heirs, executors, &c., an annuity of 800*l.*, to be paid and payable for ninety-nine years, if the said E. P. Lord Dormer should so long live, to be charged and chargeable upon the lands (inter alia) in the declaration mentioned. The indenture then further witnessed, that in consideration of 6998*l.*, paid to the said E. P. Lord Dormer as thereinbefore mentioned, and for the further and better securing the regular payment of the said annuity of 800*l.* to W. S. and J. C., their executors, &c., and in consideration of 10*s.* paid to him, the said E. P. Lord Dormer, by Chatfield, he, the said E. P. Lord Dormer, granted, bargained, sold, and demised, &c., to Chatfield the premises mentioned in the declaration, which were before charged with the payment of the said annuity of 800*l.*; habendum the premises thereinbefore granted, and every part and parcel of the same, but subject and charged as thereinbefore was mentioned to Chatfield, his executors, &c., for the term of 200 years, to be computed from the day next before the date of the indenture, and thenceforth next ensuing, and fully to be complete and ended without impeachment

of waste, if the said E. P. Lord Dormer should so long live. The defendant then demurred specially to the replication.

Serjt. *E. Laws* in support of the demurrer. The replication is bad. It ought to have shown the commencement of Lord Dormer's life estate, Co. Litt. 303 b. [*Holroyd, J.* That is unnecessary, because both the plaintiff and defendant claim under Lord Dormer.] They do not claim under the same instrument. The plaintiff claims under the lease, the defendant under the judgment and elegit. Secondly, the replication is no answer to the plea. The plea shows a judgment recovered against John E. P. Lord Dormer. The replication shows a demise by indenture by E. P. Lord Dormer. It does not show that the Lord Dormer mentioned in the plea is the same as that in the lease. It states that the lease was made by the *said* Lord Dormer, viz. the Lord Dormer mentioned in the plea. That was John E. P. Lord Dormer. The lease upon oyer appears to have been made by E. P. Lord Dormer. That lease will not bar the defendant, who claims under John E. P. Lord Dormer. If an action had been brought on the lease against John E. P. Lord Dormer, he might have pleaded non est factum, *Field v. Winlow*, Cro. Eliz. 897. Assuming the grantor of the lease to be the same person as the defendant in the action in which the judgment was obtained, it is not alleged that he was known as well by one name as the other; and, according to *Cole v. Hindson*, 6 T. R. 234, *Shadgett v. Clipson*, 8 East, 328, and *Evans v. King*, Willes, 554, such an averment was necessary in order to obviate this objection. In the next place, the plaintiff, in order to maintain this action, was bound to show a lease giving him the right of possession. But the lease set out upon oyer gives him a right in reversion only. The action being not against a mere wrongdoer, but against a judgment and elegit creditor, the plaintiff was bound to show title. The lease being a lease in reversion, gives him no title to the possession of the premises mentioned in the declaration. The replication confesses all the facts in the plea, and is intended to avoid them, and to show a right to the possession in the plaintiff, but does not do so.

*Platt*, contra, was stopped by the Court.

BAYLEY, J. This is an action of trespass. Actual possession is sufficient to entitle a man to maintain trespass against a wrongdoer. The defendant by his plea says he is not a wrongdoer, because in January, 1823, he recovered judgment against John E. P. Lord Dormer, and sued out an elegit, by virtue of which an inquisition was held, and the jurors found that at the time when judgment was obtained, Lord Dormer was seised for life of lands, (including the premises mentioned in the declaration,) and that the sheriff delivered to him those lands. In order to give the defendant a good title against the plaintiff, (who is admitted by the demurrer to have been in possession,) the defendant ought to show that Lord Dormer had some title to the land in question, at the time when the elegit issued. By the inquisition set out in the first plea, it is found that Lord Dormer was seised for life. Assuming that to be a sufficient allegation that he was so seised, does the replication confess and avoid the matters stated in the plea? It states that Lord Dormer, being seised for life before the judgment, (mentioned in the plea,) in March, 1820, by indenture bargained and sold to the plaintiff the tenements, (including the premises mentioned in the declaration,) and that he entered and became possessed, and continued so possessed until the committing of the trespass. The

plaintiff and defendant claim under Lord Dormer. The plaintiff claims by virtue of a deed executed in 1820; the defendant by virtue of a judgment obtained, and elegit issued, in 1823. The title of the plaintiff is prior in point of time. The lease supersedes Lord Dormer's right. It has been insisted that the lease set out in the replication is not an answer to the plea, because it appears by the plea that the judgment was obtained against Lord Dormer, sued by one Christian name, and it appears by the lease set out on oyer, that Lord Dormer, who granted that lease, does not use the same Christian name. But the replication alleges that the said Lord Dormer, being seised for life by indenture, demised the premises. The replication, therefore, shows that Lord Dormer, who granted the lease, and Lord Dormer, against whom the judgment was obtained, was the same person. It is not competent to the defendant upon demurrer, to say that it was not the same Lord Dormer. Lord Dormer may have been sued by a wrong Christian name in the suit in which judgment was obtained against him, or he may have used a wrong Christian name in the lease. The lease is not void by reason of the lessor having used a wrong Christian name. But it is said that the lease set out on oyer shows that the plaintiff had no right to the premises in question. It recites an indenture made by Lord Dormer in June, 1819, whereby he granted an annuity of 1725*l.* for ninety-nine years charged upon (inter alia) the premises mentioned in the declaration, and he granted, bargained, and demised those premises unto H. Dawes, habendum for 100 years. It then recites, that he had agreed to sell another annuity of 800*l.* for ninety-nine years, and he confirms the annuity of 1725*l.*, and subject thereto charges the premises in the declaration with the annuity of 800*l.*; and for better securing the regular payment of that annuity, bargains, sells, and demises unto the plaintiff (among others) the premises mentioned in the declaration, for 200 years. It appears, therefore, by the lease set out on oyer, that those premises were charged with an annuity of 1725*l.*, and for better securing the payment of that annuity had been conveyed to Dawes. The demise to the plaintiff was subject to the right of Dawes. But Dawes was not bound to enter; and if he did not enter, the plaintiff had the right. It is averred in the replication, that the plaintiff entered and became possessed, and continued in possession until the trespass was committed. The replication shows that the plaintiff had a right to the land against every person but Dawes. The demise to the plaintiff was to commence the day preceding the date of the indenture. It must be presumed, therefore, that Dawes had not entered at that time. It is quite sufficient, however, for the purposes of this case, to say that the lease set out upon the record destroys all right of the defendant, who claims under a judgment obtained against Lord Dormer in 1823, because it shows that Lord Dormer at that time had no interest in the premises mentioned in the declaration. The defendant, therefore, could derive no title from him, and was consequently a wrongdoer; and the plaintiff, having shown that he was in actual possession at the time when the trespass was committed, is entitled to maintain this action. The judgment of the Court must be for the plaintiff.

HOLROYD, J., concurred.

Judgment for the plaintiff. (a)

(a) This action was originally commenced in the name of John Doe. The defendant pleaded the judgment and elegit, &c. The plaintiff replied, the demise by indenture to Chatfield, his entry, and that after such entry the said plaintiff in Hilary term, 1826

commenced an ejectment against the defendants, in which action the said John Doe, as the nominal plaintiff, complained, &c., (setting out the declaration.) It then stated that John Doe, in Michaelmas term in that year, recovered judgment, and afterwards entered. Upon demurrer to this replication, the Court, after argument at the sittings in banc, after Hilary term, 1827, held the replication to be bad; first, for stating that Chatfield was in possession at the time of the trespasses, thereby negating John Doe's possession of them at that time, which was a departure from the declaration; and, secondly, because the replication did not, and, as it seemed, could not show any right to the possession in John Doe, or even state that he was a nominal plaintiff in this action, as well as the ejectment, but only that John Doe, as the nominal plaintiff in the ejectment, complained, &c.; and they intimated that the plaintiff had better amend, by making Chatfield the plaintiff on the record instead of John Doe; and the amendment was made accordingly.

END OF TRINITY TERM.



C A S E S  
ARGUED AND DETERMINED  
IN THE  
COURT OF KING'S BENCH,  
IN  
MICHAELMAS TERM,

In the Ninth Year of the Reign of GEORGE IV.—1828.

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MEMORANDA

In the early part of this term, Mr. Justice *Holroyd* resigned his seat in this Court. He was succeeded by *James Parke* of the inner Temple, Esq., who was called to the degree of Serjeant, and gave rings with the motto "*Justitiæ tenax*." He took his seat in this Court on Tuesday, the 18th day of November, and was afterwards knighted. *Thomas Denman*, Esq., took his seat within the bar, having received a patent of precedence.

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HELPS v. GLENISTER. — p. 553.

The statute 58 G. 3, c. 75, prohibits the buying of pheasants in all cases, and therefore by a contract for the sale of live pheasants, no property passes to the purchaser.

TROVER for live pheasants. Plea, general issue. At the trial before *Holroyd*, J., at the Summer assizes for the county of Bucks, 1828, the following appeared to be the facts of the case: The plaintiff was a dealer in pheasants residing at Bayswater. The defendant was a breeder of pheasants residing in Buckinghamshire. In October, 1827, the plaintiff went to the defendant to purchase some live pheasants, which were kept in pens. He agreed to purchase twenty-seven old birds at the rate of 5*l.* 10*s.* per score, and paid for the same; and the defendant agreed to keep them at 2*d.* per head per week, until the plaintiff should take them away. The plaintiff afterwards agreed to buy 100 young birds at 4*l.* per score, and paid 2*s.* 6*d.* as a deposit, and the defendant agreed to keep them at the same rate, until such time as the plaintiff could conveniently take them away. Three-fourths of the young birds were hens, which bear a higher price than cocks, being more valuable for breeding, and the price was calculated accordingly. The plaintiff afterwards took away the twenty-

seven old pheasants and thirteen young ones, and subsequently demanded the remaining eighty-seven, and tendered the plaintiff the price agreed upon. The defendant refused to deliver them. The learned Judge was of opinion that the buying of these pheasants was prohibited by the statute 58 G. 3, c. 75, and that no property, therefore, passed to the plaintiff by the contract of sale. The plaintiff was, therefore, nonsuited.

*B. Monro* now moved to set aside the nonsuit. It must be conceded that if the purchasing of these pheasants be prohibited by the statute 58 G. 3, c. 75, the plaintiff cannot maintain the action. By former statutes for the preservation of game, the selling of game was prohibited in certain cases, and the statutes on this subject were passed in order to prevent the destruction of game. The purchasers of live pheasants for the purpose of breeding are not within those statutes. The 2 Jac. 1, c. 27, s. 4, enacts, that every person who shall sell or buy to sell again any deer, hare, partridge or pheasant (except partridges and pheasants reared and brought up in house or houses, or brought from beyond seas), shall forfeit for every deer, hare, or pheasant so bought 20s.

The statute 5 Anne, c. 14, after reciting that the existing laws were insufficient to prevent the destruction of game, by reason of the multitude of higlars and chapmen who encouraged idle persons to neglect their employment, to destroy the same, enacted by s. 1, that all the laws then in being for preservation of game not thereby repealed, should continue in force. S. 2 prohibits any higlar, chapman, &c., from selling any pheasant, &c. The exception in s. 4 of 2 Jac. 1, c. 27, not being repealed, was, therefore, continued by the express words of s. 1 of stat. 5 Anne, c. 14. The statute 28 G. 2, c. 12, was passed to remove doubts as to the meaning of the word *chapman*, and left the law in other respects as it was before. If that be so, the selling of pheasants reared in houses was not prohibited before the stat. 58 G. 3, c. 75. Now that stat. is entitled an act for the more effectual prevention of offences connected with the *unlawful* destruction and sale of game. It assumes, therefore, that there may be a lawful sale of game. This statute for the first time makes the buying of a hare, pheasant, &c., an offence. It recites, that selling game was already prohibited, and proceeds to subject the party buying to a penalty. But the buying is only made an offence in those cases where the selling would have been an offence before, and the selling pheasants reared in houses was not prohibited. Here it was proved that the defendant was a breeder of pheasants, and that the pheasants in question were openly exposed for sale by him in pens. It was therefore fair to presume that they were reared in a house by him. But supposing the purchase in this instance to have been within the words, it was not within the spirit of the statute, which was passed to prevent the destruction of game, whereas the object of the parties here was its preservation, the pheasants having been purchased for breeding, and a higher price paid for the hen birds with that view. In *Bridger v. Richardson*, 2 M. & S. 568, it was held, that the 3 Jac. 1, c. 12, which prohibits persons from "willingly taking, destroying, or spoiling any spawn, fry, or brood of any sea fish in any wear, or other engine or device whatsoever," did not comprehend shell fish, and if it did, it meant a taking for destruction, and not a taking of oyster spawn for the purpose of removing it to beds for further growth and maturity, to make it marketable.

Lord TENTERDEN, C. J. The exception in the statute of 2 Jac. 1, c. 27, s. 4, is not incorporated in the statute 5 Anne, c. 14, or the 28 G. 2, c. 12, which statutes prohibit the selling and offering to sale of any game,

or in the statute 58 G. 3, c. 75, which makes the buying of game an offence. The language of the 58 G. 3, c. 75, is general, and the exception in the statute 2 Jac. 1, c. 27, seems to be done away with. But if it could be engrafted on the statute 58 G. 3, c. 75, it would have been incumbent on the plaintiff to have proved at the trial that the pheasants purchased by him had been reared in a house, or brought from beyond the seas. There was no proof at the trial to bring the case within the words of that exception; I think, therefore, that in either view of the case the nonsuit was right.

Rule refused.

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WHITNASH and Another v. H. GEORGE and B. GIFFORD. —  
p. 556.

In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money.

DEBT on bond, dated the 6th of October, 1824. The defendant George suffered judgment by default. The defendant Gifford cravedoyer of the bond and condition. The condition, after reciting that the plaintiffs had taken one Samuel Pitman into their service as a clerk, and that H. George and R. Gifford had agreed to enter into the bond for his fidelity in the said employ, was that Pitman should from time to time, and at all times, so long as he should be in the service of the plaintiffs, well, and truly, and faithfully, account for, pay over, and deliver unto the plaintiffs, their executors, &c., or to such other person or persons as they, or any or either of them, should direct, all sums of money, books, papers, matters, and things of or belonging to the plaintiffs, which should at any time, and from time to time, be received by, or come to the hands of him, the said S. Pitman, and also did and should act and conduct himself, at all times, with fidelity, integrity, and punctuality in and concerning the matters and things which should or might be reposed in or intrusted to him as such clerk as aforesaid. Plea, that Pitman did from time to time, and at all times, so long as he continued in the service of the plaintiff, well, truly, and faithfully account for, pay over, and deliver unto the plaintiffs all sums of money, books, papers, matters, and things belonging to the plaintiffs, which at any time, and from time to time, was or were received by, or came to the hands of him, Pitman; and act and conduct himself at all times with fidelity, integrity, and punctuality, in and concerning the matters or things which were reposed in or intrusted to him as such clerk as aforesaid. Replication, that during the said time that Pitman so remained in the said service of the plaintiffs as such clerk, to wit, on the 7th of October, 1824, he, Pitman, as such clerk, had and received, for and on account of the plaintiffs, divers sums of money, amounting to 2000*l.*, belonging to the plaintiffs, yet Pitman, although often

requested, had not accounted for or paid over the same, or any part thereof, to the plaintiffs. Rejoinder, that Pitman did not as such clerk have or receive, for and on the account of the plaintiffs, the said sums of money in the replication mentioned, or any part thereof. At the trial before *Littledale, J.*, at the Summer assizes for the county of Somerset, 1828, it appeared that the plaintiffs were bankers at Yeovill, in Somersetshire; and that Pitman became their clerk in October, 1824, and continued to act as such until February, 1826, when he died. It was his duty, as such clerk, to keep the plaintiffs' books. In order to prove that Pitman was indebted to the plaintiffs at the time of his death, on account of money received by him in his character of clerk, the plaintiffs produced the book kept by him, in which there were entries in his hand-writing of various sums of money received by him during the time he continued in their service as clerk. It was objected, that although these entries would have been evidence against Pitman, they were not evidence against the defendants, who were his sureties. The learned Judge received the evidence, and directed a verdict to be found for the plaintiffs, but reserved liberty to the defendants to move to enter a nonsuit.

*Merewether, Serj.*, now moved accordingly. The entries in the books were not admissible in evidence against the defendants. They were not the best evidence of the money having been received by Pitman. The parties who paid the money to him might have been called. In *Cutler v. Newlin, Mann. Dig. 137*, on the execution of a writ of inquiry under the 8 & 9 W. 3, c. 11, on an indemnity bond, an admission by the principal of the amount of the damnification was considered by *Holroyd, J.*, inadmissible, and the amount was proved *aliunde*. In *Goss v. Watlington, 3 Brod. & Bingh. 132*, the Court of Common Pleas held, that in an action against a surety who had entered into a joint bond with his principal on his appointment to a *public* office, conditioned for payment of all moneys received, and further, that the principal should from time to time enter into certain books all moneys by him received, entries in such books by the principal were after his death evidence against the surety. But the decision in that case proceeded on the ground that the books were public books.

Lord TENTERDEN, C. J. It appears by the recital in the condition of the bond, that the plaintiffs had agreed to take Pitman into their service as a clerk, and that the defendants had agreed to become bound for his fidelity in the said employ; and the condition was, that Pitman should well and truly account for, pay over, and deliver to the plaintiffs, or to such other persons as they should direct, all sums of money, books, papers, matters, and things belonging to the plaintiffs, which should come to his, Pitman's, hands. The defendants plead general performance. The plaintiffs reply, that Pitman, as such clerk, had received, for and on account of the plaintiffs, divers sums of money belonging to the plaintiffs and had not accounted for or paid over the same to the plaintiffs. The defendants rejoin, that Pitman did not, as such clerk, have or receive, for and on the account of the plaintiffs, the said sums of money in the replication mentioned; and upon that allegation issue is joined. It lay upon the plaintiffs, therefore, to show that Pitman did have and receive sums of money for which he had not accounted. In order to prove that fact, the plaintiffs produced the books kept by Pitman in discharge of his duty as their clerk. Those books contained entries made by him, whereby he

charged himself with various sums as having been received by him on account of the plaintiffs. The question, therefore, is, whether those entries be evidence after his death against the defendants, who bound themselves to the plaintiffs, that he should faithfully discharge his duty as clerk, and account to the plaintiffs or to their nominee. I think those entries whereby he charged himself with sums of money as having been received by him for the plaintiffs were admissible in evidence against the defendants in an action on the bond, whereby they became bound that Pitman should faithfully discharge his duty as clerk. It is part of the duty of a banker's clerk to make entries (in the books kept by him) of all sums of money received by him for his employers. Such entries made by the clerk must, as against his sureties, who contracted for the faithful discharge of his duty, be taken *prima facie* to have been made by him in discharge of that duty. I think, therefore, that in this action the entries made by Pitman, (in those accounts which it was his duty as the clerk of the bankers to keep,) whereby he charged himself with the receipt of sums of money, were after his death admissible evidence of those sums having been received by him, not altogether as declarations made by him against his interest, but because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendants had contracted that he should faithfully keep,

BAYLEY, J. The foundation of the decision in *Goss v. Watlington*, 3 Brog. & Bingh. 132, was, that the entries made by the collector were admissible, not merely as a declaration made by him against his interest, but on the ground that they were entries in those very books, which by the condition of the bond the principal was bound faithfully to keep. The entries were evidence against the surety, because they were made by the collector in pursuance of the stipulation contained in the condition of the bond. That case in principle is the same as the present.

Rule refused.

ALLEN and Another, Assignees of SCOTT, a Bankrupt, v. SUGRUE.  
— p. 561.

Where a vessel insured in a valued policy at 2000*l.* received damage by perils of the sea, which could have been repaired for 1450*l.*, but the jury found that the vessel was not worth repairing: Held, that this was a total loss, and the assured were entitled to recover the sum at which the vessel was valued in the policy.

Assumpsit against the secretary of the St. Patrick's Assurance Company on a policy effected by the bankrupt on the ship *Benson*, valued at 2000*l.* for twelve months from the 3d of December, 1825, averring a total loss by perils of the sea. The defendants paid money into court to cover an average loss, and pleaded the general issue. At the trial, before *Bayley, J.*, at the last Summer assizes for Newcastle-upon-Tyne, it was proved that the policy was duly executed, and that the *Benson* was afterwards stranded at the entrance of the Hull dock. That it would have cost about 1450*l.* to repair her, and that when repaired she would not have been worth that sum. For the defendant it was contended, that the plaintiffs could not recover for a total loss; as in that case they would receive 2000*l.*, whereas the cost of repairing the damage done to the ship would not be more than 1450*l.*, and that, as sufficient was paid into court to recover a loss of 1450*l.*, the plaintiffs must be nonsuited. The learned Judge reserved the point, and left it to the jury to say whether the ship was worth repairing, and they found that she was not, and a verdict was entered for the plaintiffs for a total loss. In Michaelmas term,

*F. Pollock* moved for a rule nisi to enter a nonsuit. The utmost that the assured can claim is an indemnity. If, therefore, the underwriters are prepared to pay the amount of repairs necessary, or themselves to undertake the repairs, the assured have no right to take the actual value for the purpose of converting mere damage into a constructive total loss, and then to call upon the underwriters to pay the agreed value in the policy. If the agreed value is to bind the underwriters in ascertaining the amount of the loss if total, it ought equally to bind the assured in estimating whether the loss was total or not. [Lord *Tentenden, C. J.* Can there be a different rule in ascertaining whether a loss be total or not in an open policy and a valued policy?] The rule, if carefully examined, is really the same; but a constructive total loss is in fact not a total loss. The ship in this case existed in specie, was capable of being repaired, and might, by such repair, have been put into as good or a better condition than she was in before the accident. To call such a state of things a total loss, even though qualified as a constructive total loss, would be an abuse of language, but that it shortly expresses the real state of things, viz: that with reference to the actual value of the vessel it is not worth while to repair. In an open policy, the actual value is the criterion according to which the underwriter is to pay. In a valued policy, the criterion ought also to be the same, viz: that according to which the underwriter is to pay, that is the agreed value. The effect of allowing the assured to claim as he has in this case is unjust, as it gives him much more than an indemnity for a loss which (by whatever name it be called) is a mere case of damage. Where the loss is in fact total, the underwriter cannot complain of being called on to pay the full agreed value in lieu of the ship which he cannot restore; but where the loss is not in fact total, it is sufficient to put the assured in as good a situation as he would have been in had the loss not occurred. A constructive total loss, as it is

called, may arise in various ways, not merely by a ship not being worth repairing, but by certain charges upon her exceeding her actual value. Suppose a case of salvage, the vessel remaining not only as an existing ship, but absolutely uninjured by the circumstances which gave rise to the salvage, could the assured say this is a constructive total loss, if we were uninsured we should not pay the salvage, and, therefore, we call on you for the total loss? Or, might not the underwriters say, we will pay you the salvage, and restore you your vessel undamaged, and what more can you require? There is, besides, this mischief in allowing the assured thus to estimate the loss on a valued policy: that as long as there would be a surplus of the smallest amount after repairing the vessel, the loss is not to be deemed total, but an average loss only, and the assured can claim the repairs only; but if the repairs required go the least beyond that point, the loss is to be deemed total, and the assured may demand the agreed value. A difference, therefore, of 5*l.* in the damage, may make a difference of several hundred pounds in the loss. In this case, if the repairs necessary had been only 1400*l.*, the underwriters would have been liable to that only, and might have deducted one-third new for old. But being 1450*l.*, the vessel is not worth repairing, and the underwriters are called on to pay 2000*l.* An increase, therefore, of the damage by 50*l.*, makes a difference to the underwriters of near 1000*l.* The fallacy seems to arise from calling this a *constructive total loss*, which, though a convenient expression, really means a state of things in which the loss is not total.

LORD TENTERDEN, C. J. I am of opinion that the question, whether the loss sustained is a partial or total loss, is precisely the same where the value of the ship has been mentioned in the policy, and where that has been left open. If the value has not been mentioned, it must be ascertained by evidence; if it has been mentioned, then all further inquiry is unnecessary, as the parties have agreed as to what shall in the event of loss be considered the value. If underwriters find by experience that the practice of entering into valued policies is injurious to them, they may very easily avoid it for the future. Then, was this a total loss? The jury have found that the ship was so much damaged as not to be worth repairing, or, in other words, that although the materials of the ship remained, the ship itself did not. That in my mind constitutes a total loss; and it would be strange if this were otherwise, for the ship ceased to exist for any useful purposes as a ship. A total loss of the ship ought, therefore, to be paid for, and that is the sum agreed upon as the estimated value of the ship, minus the value of the materials saved.

BAYLEY, J. I think that the question whether a loss is total or not depends upon the facts of the case, and the nature and extent of the damage done to the ship; and not upon the nature of the policy effected upon her. Whether that is valued or open cannot alter the nature of the loss. The only difference between them is, that in one case the assured must prove the value of the thing insured; in the other he need not.

Rule refused.

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ALLEN and Another, Assignees of SCOTT, a Bankrupt, v. MORRISON. — p. 565.

Where the members of a mutual insurance club all executed the same power of attorney, severally authorizing the persons therein named to sign the club policies for them: Held, that it required only one stamp.

ASSUMPSIT, by the same plaintiffs as in the last case, on a policy of insurance on the ship *Benson*, effected by Scott in a mutual insurance club, of which Scott and the defendant were members. Plea, the general issue. At the trial before *Bayley, J.*, at the last Summer assizes for Newcastle-upon-Tyne, it appeared that each member of the club had a ship insured therein; that a power of attorney was executed by all the members, whereby they severally appointed certain persons their attorneys to execute policies on the ships admitted into the club, by virtue of which they signed each policy with the names of all the members of the club, except that of the owner of the ship insured; and the sum under-written by each member was regulated by the value of his own ship. The power of attorney was produced in order to show an authority to subscribe the policy in question with the defendant's name; when it appearing that it had only one stamp of 1*l.* 15*s.*, it was objected, that as it was a several power given by each member of the club to the persons therein named, there ought to have been a separate stamp for each. The learned Judge overruled the objection, but gave the defendant leave to move to enter a nonsuit; and the plaintiffs having obtained a verdict,

*Cresswell* now moved accordingly. The general rule upon this subject, as laid down in *Phillipps on Evidence*, P. 445, 8d edit., has been recognised in a variety of cases. It is as follows: "If the interest of the parties relates to one thing, which is the subject-matter of the instrument, or in other words, if the instrument affects the separate interest of several, and there is a community of the same subject-matter as to all the parties, there a single stamp will be sufficient; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party." Upon this principle, it was held, that an agreement whereby several persons separately agreed to advance certain sums of money to make a dock, required but one stamp, *Davis v. Williams*, 13 East, 232; and that an assignment by several of their separate interests in one and the same fund, required only one stamp, *Baker v. Jardine*, 13 East, 232, n. But here there is not a community of interest, nor a community of purpose, nor the same subject-matter of insurance throughout, although to a great extent. For each member, as to his own ship, has an interest adverse to that of all the other members, he is the assured, they are the insurers; the same purpose is no longer common to them all, his object is then to be insured, not to insure others; to receive an indemnity, not to grant one. Suppose two persons, instead of twenty or more, were to execute a several power of attorney to A. B., authorising him to sign policies whereby the two principals should insure each other, it could not be said that there was any community of interest, or any common purpose, or the same subject-matter to be insured by each; and if that be so, it is clear that in the present case there was not a community of interest or of purpose throughout.

Lord TENTERDEN, C. J. I am of opinion that one stamp was sufficient for the power of attorney in question. There was certainly a community of purpose actuating all the members of this club, viz., that each should be insured by all the others. And although it may perhaps be said that there was not an entire community of interest, that is not sufficient to make several stamps necessary.

Rule refused.



H. B. COLES, Administrator of C. COLES, v. HULME. — p. 568.

The condition of a bond recited that A. was indebted to B. in various sums of money, which were all stated in pounds sterling, and money of a smaller denomination, and that the bond was given to secure payment of those sums. In the obligatory part of the bond the word *pounds* was omitted; it merely stated that the obligor became bound in 7700, without stating what description of money: Held, that from the condition the intent manifestly was, that the obligor should become bound in 7700 *pounds*, and that the word *pounds* might therefore be supplied.

DECLARATION by the plaintiff, as administrator of Catherine Coles, deceased, on a bond bearing date the 1st of June, 1808, for 7700*l.* Plea, after craving oyer of the bond and condition, non est factum. At the trial, before Lord Tenterden, C. J., at the London sittings after last term, it appeared upon the production of this bond, that the word “pounds” in the obligatory part of the bond had been omitted. The penalty was merely described as 7700, without any species of money being mentioned. The condition of the bond recited an indenture of the 5th of January, 1807, whereby P. Coles and J. C. Burckhardt agreed to become partners in trade for seven years, with a stipulation, that if either party should happen to die before the expiration of that time, the survivor should for two years afterwards carry on the trade for the benefit of the survivor and the executors of the deceased partner, on the same terms as if both were living, and at the end of the term of two years the survivor should take the whole stock, and should pay the value of a moiety of such stock to the executor of the deceased partner; and for better securing payment of the said sums, the surviving partner should, within three months after the end of the said term of two years after the decease of his copartner, become bound to the executors of that partner in a bond conditioned for payment of the money, and for indemnifying the executors of the deceased partner from all debts; and upon executing said bond, the executors of the deceased partner were to assign to the surviving partner all the joint property in the stock in trade. It then recited that P. Coles died on the 19th of September, 1808, and appointed Catherine Coles his executrix; and that P. Coles had, during his lifetime, advanced to the joint trade 1500*l.*, exclusive of 1000*l.* advanced to Burckhardt, and secured to P. Coles by the bond, and that those sums were still due; and that C. Coles and Burckhardt had, in lieu of carrying on the trade in partnership for two years, agreed to dissolve the same immediately; and that, in lieu of the profits of the moiety of the business for those two years, Burckhardt should pay C. Coles 1000*l.* in the manner thereafter mentioned, as a full compensation to her for all the profits which she would have been entitled to if the trade had been carried on for the space of two years. It then recited, that the copartnership property had been valued at 4718*l.* 2*s.* 7*d.*, and that C. Coles had assigned to Burckhardt her moiety in the stock in trade, and that the latter had indemnified C. Coles against all claims arising out of the copartnership; and that it had been agreed that Burckhardt and the defendant should enter into the bond for securing to C. Coles, her executors, &c., the payment of the several sums of 1000*l.* and 1500*l.*, so advanced by P. Coles to the joint trade, and of the sum of 2359*l.* 1*s.* 3½*d.*, being one moiety of 4718*l.* 2*s.* 7*d.*, the value of the partnership effects. The condition of the bond then was, that if Burckhardt should pay to C. Coles the full sum of 1000*l.*, with

interest by instalments, as therein mentioned; and also the sum of 1500*l.* on the 1st day of November then next, being the money advanced by P. Coles in his lifetime to the joint trade; and also, on the 1st of January, 1809, 1179*l.* 10*s.* 7½*d.*, being one moiety of the sum of 2359*l.* 1*s.* 3½*d.*, the moiety of the value of the partnership effects; and on the 1st day of January, 1810, the further sum of 1179*l.* 10*s.* 7½*d.*, being the remaining moiety of the said sum of 2359*l.* 1*s.* 3½*d.*, together with interest, the bond was to be void. It was objected by Sir *James Scarlett* that the bond was void for uncertainty, because it did not specify any description of money; it might, therefore, be marks, guineas, or pounds. Lord *Tenterden*, C. J., was of opinion, that as it appeared by the condition that the bond was given to secure various sums of money described as being composed of pounds, &c., it might fairly be inferred that the penal part of the bond, which was given to secure the payment of those sums, should be in the same species of money, and that in furtherance of that intention the word "pounds" might be supplied; and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Sir *James Scarlett* now moved accordingly. In every obligation there must be an obligor, an obligee, and a sum in which he is bound; Com. Dig. tit. Obligation (A), citing *Dodson v. Kaye*, Yelv. 193. In the same work, tit. Fait, (F) 1, under the head "when a deed shall be avoided," it is said, "But if a deed, after execution, be altered in a material place by rasure, interlineation, addition, &c., by the obligee himself, it shall be void, as if it be altered in the name of the obligor, obligee, or sum," citing *Pigot's case*, 11 Co. 27. The sum, therefore, is a material part of a bond. If the sum be expressed ungrammatically, the defect may be supplied where the intention of the parties can be collected; as where the obligation was in octaginta libris with a condition to pay 40*l.*, it was adjudged a good obligation for octoginta libris, 10 Coke, 133 a, and Com. Dig. tit. Oblition (B), 3; where several other instances are collected. But there is no case where the entire omission of the number of pounds has been supplied. On the contrary, it was declared by the Court in *Loggins v. Tisherton*, Yelv. 225, that such an omission would render the bond void; and if so, upon the same principle, the omission of the description of money in which the party is bound must render the bond void. Accordingly, a bond whereby a man is bound in twenty liveries is void, because it does not appear that it was intended libris, Com. Dig. Obligation, (B) 5, or in viginti literis, instead of libris, *Partrose's case*, cited in *Hills v. Cooper*, Cro. Jac. 603. If, however, it be only improperly expressed, as *pounds* instead of *pounds*, the defect may be supplied if the intent of the parties be apparent. There is no instance where the total omission has been remedied. The bond, therefore, in this case must be void, unless the omission of the word *pounds* can be supplied by reference to some other part of the bond. The obligatory part of the bond furnishes no materials for that purpose. The inference, if it can be made at all, must be made from the condition. The bond and condition certainly form but one instrument, but they are separate and distinct in their nature. There is no necessary dependence or connection between them. The condition may be void and the bond remain good. If the condition be insensible, or to do an impossible act, the bond will be single. If the bond be void from the omission of some essential part, it cannot therefore be supplied by the

condition. Assuming, however, that the condition may be referred to for that purpose, it does not furnish sufficient materials to raise the inference. The condition, indeed, contains a recital that the parties had agreed to execute the bond for securing the payments of the several sums therein mentioned, which are stated in pounds sterling. This recital is only declaratory of an intention to make a valid bond. But such a declaration will not supply the defect of necessary forms. It is no more than what might be said in every case where parties execute informal instruments. In such cases they always mean to act effectively. Here they have not executed the bond which they intended; for it cannot be said for what amount it was to be taken as a security. The money payable by the condition is estimated in pounds, but the number mentioned in the obligatory part of the bond does not, as usual, amount to double the number of pounds which appears by the recital in the condition to be payable. The object of the parties might as well be obtained by the insertion (in the bond) of guineas as well as pounds. The extent of the obligors' liability will be varied according as one or the other is inserted. Such an inference can only be drawn where it necessarily results from the facts stated in the condition. In Rolle's Abr. Obligation, (D) 147, it is said, "if a man be bound to the sheriff in quadragint libris, with a condition for appearance, this is not an obligation for 40*l.*, for gint imports centum, and rather denotes 400 than 40, and the condition being collateral, does not show the intent." The condition there was perfectly clear. But the bond was held to be void by reason of the uncertainty as to the extent of the penalty.

LORD TENTERDEN, C. J. In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties. The question in this case is, Whether there is in this bond that degree of moral certainty as to the species of money in which the party intended to become bound. I thought at the trial there was. The obligatory part of the bond purports that the obligor is to become bound for 7700. No species of money is mentioned. It must have been intended that he should become bound for some species of money. The question is, Whether from the other parts of the instrument we can collect what was the species of money which the party intended to bind himself to pay. [His Lordship then read the recitals in the condition, and proceeded as follows.] It appears, therefore, that the intent was that the defendant should enter into a bond for securing to P. Coles various sums of money described in these recitals, as being composed of pounds sterling and other money of a smaller denomination. That being so, I cannot entertain any doubt that the intention was that the obligor should, in order to secure the payment of those sums, become bound in a penalty consisting also of pounds sterling; and if that were the intention, then the bond ought to be read as if the word *pounds* were inserted in it.

BAYLEY, J. It has been decided, that in furtherance of the obvious intent of the parties, even a blank may be supplied in a deed. (a) In

(a) The case alluded to by the learned judge was, probably, that of *Lloyd v. Lord Say and Sele*, 10 Mod. 46. There the name of the bargainor was omitted in the operative part of a bargain and sale, and it was supplied in K. B., it manifestly appearing from the other parts of the deed that Lord Say was the grantor; and the judgment of the Court of K. B. was afterwards affirmed in the House of Lords, 1 Brown's Parliamentary Cases, 379. In *Langdon v. Goole*, 3 Lev. 21, a man was bound in an obligation, but it was not said to whom, and that was supplied. See also *Uvedale v. Halfpenny*, 2 P. Wms. 151; *Ex parte Symonds*, 1 Cox, 200; *Bishop v. Church*, 2 Ves. Sen 100, 371; *Targus v. Pugh*, 2 Ves. 194, and *Cholmondeley v. Clinton*, 2 Jac. & W. 1.

*Wagh v. Russell*, 1 Marshall, 214, the word hundred was omitted in the latter part of the condition of a bond. It was held that it might be supplied, and that in pleading, the bond might be described according to its legal effect, as if the word hundred had been inserted in it. I think in this case that it is obvious that the obligor meant to bind himself in a penal sum consisting of pounds sterling, and, therefore, that the omission of the word pounds may be supplied.

LITLEDAL, J. I have entertained some doubts whether the word pounds could be supplied; but, upon the whole, I think it sufficiently appears, from the recital in the condition of the bond, to have been the intention of the parties that the penal part of the bond, which was to secure the payment of various sums stated in the condition in pounds sterling, should also be *pounds*.

Rule refused.

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CARPENTER v. BLANDFORD. — p. 575.

A. agreed to sell to B. his interest in a public house, and his furniture, &c., at an appraisement to be made by two appraisers, the same to be paid for on B.'s taking possession, which was to be on or before the 25th of March then next; and 30*l.* was paid by B. as a deposit; and he agreed that if he should not complete his part of the agreement, the sum so paid should be forfeited. The buyer and seller appointed appraisers respectively. On the 25th of March the two appraisers met, and the seller's appraiser was then informed that the appraiser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day; no objection was then made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract: Held, that, under the circumstances, it was incumbent on the seller, if he intended to insist that the contract should be completed on the day mentioned in the agreement, to have notified such intention to the buyer; and not having so done, that the latter was entitled to recover back the deposit.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial, before Lord *Tenterden*, C. J., at the Middlesex sitting after last term, the following appeared to be the facts of the case:—By an agreement of the 25th of February, 1828, for the sale of the interest in a public house and stock in trade of a publican, between the plaintiff and defendant, in consideration of 262*l.*, to be paid as good-will to the defendant, he agreed to sell to the plaintiff his interest as tenant at will in a public house, and all his household furniture, goods, fixtures, and effects on the premises, at a fair appraisement, to be made by two appraisers or their umpire, and all his stock in trade, the value of such stock to be ascertained by two proper persons, or their umpire; in consideration of which the plaintiff agreed to accept the said house and premises as tenant at will, and pay the sum of 262*l.* good-will, and to purchase the household furniture, goods, fixtures, stock, and effects upon the premises at a fair valuation, to be made in the manner above stated, and to pay for the same at the time of his taking possession of the premises, which it was mutually agreed by the parties should be on or before the 25th of March, 1828, and as earnest of the agreement, the plaintiff had paid into the hands of the defendant the sum of 30*l.*, to be allowed in part payment on the completion of the agreement, but should the plaintiff not complete his part of the agreement, the said sum of 30*l.*,

paid as a deposit, was to become forfeited ; and it was further agreed, that either of them not performing all and every part of the agreement, the party defaulting should pay to the other 100*l.* as liquidated damages ; and further, that should Messrs. Calvert and Co. refuse to accept the plaintiff as tenant, the deposit money was to be returned, and the agreement was to be void. It appeared that the plaintiff and defendant had appointed appraisers respectively to make the valuation of the furniture, stock, &c., mentioned in the agreement. On the 25th March the defendant's appraiser was informed by the plaintiff's appraiser that he was so busy on that day that he could not complete the valuation of the defendant's stock in trade on that day, but that he would on the following day. No objection was then made to the delay. The plaintiff attended with his appraiser at the defendant's premises at nine o'clock on the following morning ; but the defendant told him he had come too late, that he ought to have come on the preceding day, and prohibited the broker from making any valuation. It was further proved, that the brewers had not refused to accept the plaintiff as tenant. Upon these facts it was contended, that as the defendant was ready to complete the agreement on the 25th March, and the plaintiff had made default, the deposit was forfeited by the terms of the agreement. Lord *Tenterden*, C. J., was of opinion that under the circumstances of this case the plaintiff was not bound to complete the contract on the 25th, that as the defendant's agent was told on the Tuesday that the plaintiff's appraiser could not attend on that day, but would on the day following, he, the defendant, was bound, if he meant to avail himself of the strict rule of law that the contract should be performed on the day mentioned in the agreement, to send notice to the plaintiff that he would insist that the contract should be completed on that day ; and he directed the jury to find a verdict for the plaintiff.

Sir *James Scarlett* now moved for a new trial, and contended, that the time fixed for the completion of the contract was at law an essential part of the contract, *Berry v. Young*, 2 Esp. 640 ; *Lloyd v. Collett*, 4 Bro. C. C. 469, 4 Ves. 698. Here, therefore, the plaintiff was bound by the terms of the agreement to be ready to complete his contract on the 25th of March ; he made default, and then by the terms of the agreement the deposit was forfeited.

BAYLEY, J. The defendant in this case insists on a forfeiture, which is *strictissimi juris*. He ought, therefore, to show that he has done every thing which he was bound to do to entitle him to insist on the forfeiture, and that he has not done any thing to waive that right. It appears by the agreement between the parties, that the contract was to be completed on the 25th of March. The stock in trade was to be valued by appraisers. Each party had appointed one. On the 25th of March the plaintiff's appraiser informed the appraiser appointed by the defendant that he, the plaintiff's appraiser, would not be able to finish the valuation until the day following, at three o'clock ; to which the defendant's appraiser made no objection. It was the duty of the defendant's agent to inform his principal that such a communication had been made by the plaintiff's agent ; and it must be presumed that he did so. If that communication was made, and the defendant meant to insist on the forfeiture, it was his duty to inform the plaintiff that he should insist on the forfeiture unless the contract was completed on that day. Such

communication not having been made, I think the plaintiff was entitled to recover back the money deposited.

LITTLEDALE, J., concurred.

Rule refused.

PATTISON v. JONES. — p. 578.

A., having discharged his servant, and hearing that he was about to be engaged by B., wrote a letter to B., and informed him that he had discharged him for misconduct. B., in answer, desired further information. A. then wrote a second letter to B., stating the grounds on which he had discharged the servant. In an action by the servant against A. for a libel contained in this letter, it was held, that assuming the letter to be a privileged communication, it was properly left to the jury to consider, whether the second letter was written by A. bona fide, or with an intention to injure the servant.

DECLARATION stated that the plaintiff, before, &c., had been retained and employed in the service of the defendant as his butler and servant; and in that capacity had behaved with good temper, ability, sobriety, honesty, and general propriety of conduct, and never was or until the time of, &c., suspected to have been guilty of drunkenness, absence from duty, misconduct, audacity, or of having made free with, or stolen, or purloined wines or goods of the defendant, his master, by means whereof he, the plaintiff, had not only deservedly gained the good opinion of all his neighbors, &c., but had also supported himself, and would thereafter have supported himself by his exertions in the service of his masters and employers, had not such grievances been committed as thereafter mentioned; that the plaintiff, before, &c., had applied to be employed by and in the service of one A. F. Mornay, as a butler and servant, yet the defendant, well knowing the premises, but contriving, &c., to cause it to be suspected and believed by those neighbors, &c. and particularly by A. F. Mornay, that the plaintiff was not fit to be employed or trusted as a servant, and that he had been guilty of drunkenness, absence from duty, and misconduct, and that he had made free with, and stolen, and purloined the wines of the defendant whilst the plaintiff was in the service of the defendant as butler aforesaid; and thereby to prevent A. F. Mornay from employing him, plaintiff, in his service, and to wholly ruin him, and to deprive him of the means of supporting himself by honest and industrious means, on, &c., at, &c., wrongfully and maliciously did write, compose, and publish a certain false, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning the conduct of the plaintiff whilst he was in the service of the defendant, in the form of a note or letter directed to A. F. Mornay, containing therein the false, malicious, defamatory, and libellous matter, &c. &c., of and concerning, &c., that is to say, "Sir, (meaning the said A. F. Mornay,) Having been informed that you had an intention of taking my butler into your service, I feel it incumbent upon me as a neighbor to inform you that I have just discharged him for misconduct, and that I cannot feel myself justified in recommending it to you to engage him; I have been rather surprised that you have not applied to me for his character, but I shall not think any more about it." A second count charged the defendant with publishing the following libel: "I (meaning the defendant) have no hesitation in informing you that I discharged my butler, not only on account of drunk-

eness and absence from his duty in my house, but on account of my having great reason to believe that he had made free with a great deal of my wines, &c., in which I found a very great deficiency upon an examination with the cellarman who packed it up to be brought down to Putney, who took a regular account of it, which I have got. Pattison had the audacity to open all those packages without any authority from me; and he acknowledged that fact yesterday before witnesses, when he was so conscious of his misconduct that he said he would not take any situation in the neighborhood of Putney." By means whereof the plaintiff had been greatly injured in his good name and character amongst his neighbors and other subjects, and particularly with the said A. F. Mornay, inasmuch that they had hitherto suspected and believed the plaintiff to have been guilty of drunkenness and felony whilst in the service of the defendant, as such servant or butler, and to be unfit to be trusted or employed in the capacity of a servant; and also by reason of the premises, and on no other account whatever, A. F. Mornay afterwards wholly refused and declined to retain and employ the plaintiff in his service, as he otherwise would have done, and by reason thereof the plaintiff had not only been deprived of the support, wages, &c., which would have accrued to him from being so retained and employed as last aforesaid, but had hitherto continued and still was out of service and employ, and deprived of the means of supporting himself, and was otherwise greatly injured and damaged, and almost wholly ruined. Plea, general issue. At the trial before, Lord Tenterden, C. J., at the Middlesex sittings after last term, the plaintiff proved the hand-writing of the defendant to the two letters set out in the declaration, and the following letter of Mr. Mornay, to which that set out in the second count was an answer: "Sir, — It is necessary that you should state the particulars of the misconduct of your steward to determine me to deprive him of the situation for which he has applied to me. Is he sober and honest? You will of course consider that there ought to be strong grounds for depriving a man of his character and his bread;" — and claimed to recover damages for the libel set out in the second count, but abandoned the first count, and all claims for special damage. It was objected by the defendant, that as it appeared that the letter containing the alleged libel was written to a third party, who had invited the defendant to give him a character of the plaintiff, it was *prima facie* a privileged communication; and that it therefore lay on the plaintiff to show malice in fact, or that the defendant was actuated by ill-will towards the plaintiff. (a) To this it was answered by the counsel for the plaintiff, that in an ordinary case, where a master is called upon by a third party to give a character to a servant, and communicates slanderous matter, it is supposed to be done in discharge of a duty, and is a privileged communication, the inference of malice in law resulting from the nature of slanderous matter being rebutted by the occasion on which that matter is written or spoken. In that case it is incumbent on a plaintiff to prove malice in fact. But in this case the defendant wrote the first letter without being required so to do. That letter imputes misconduct to the plaintiff, and invited the third party to make further inquiry. The writing of that letter, under those circumstances, was evidence to go to the jury that the defendant was actuated by malice in fact or ill-will against the

(a) See *Bromage v. Prosser*, 4 B. & C. 247.

plaintiff. Lord *Tenterden* was of opinion that under the circumstances of this case it was a question for the jury whether the defendant when he wrote the second letter acted bona fide. The defendant's counsel then proposed to call witnesses to prove the truth of the statements, in order to show that they were made bona fide. Lord *Tenterden* received the evidence, but expressed doubts whether it was admissible under the general issue; and he finally directed the jury to find for the defendant if they thought, from the evidence, that he made the communication bona fide; but for the plaintiff, if they thought he made the communication with the intention to injure the plaintiff. The jury having found for the plaintiff,

Sir *James Scarlett* now moved for a new trial. A master who gives the character of a servant thereby discharges a duty which the convenience of society calls upon him to perform. If, therefore, in giving such character he communicates slanderous matter, the law, prima facie, presumes his intention to be innocent, and requires the servant who complains of slander under such circumstances to rebut the presumption arising from the character in which the slander is spoken or written, and to show that the master was actuated by ill-will towards him, the servant. Here it appeared by the cross-examination of the plaintiff's witnesses that he, the plaintiff, had been in the service of the defendant, and by the contents of the second letter, it appeared that it was written in answer to one from Mr. Mornay. The matter contained in that letter was a privileged communication, and therefore it lay upon the plaintiff to give evidence that the defendant was actuated by malice in fact. It is true that the defendant first wrote to Mornay without being called upon so to do. But it is the duty of every man who knows that another is about to receive into his service one who has been guilty of the misconduct imputed to the plaintiff, to communicate to that other the fact of such misconduct. The prima facie presumption therefore was, that the defendant's intention was innocent, and no evidence was given to rebut that presumption.

LORD TENTERDEN, C. J. It appeared in the case proved on the part of the plaintiff, that the defendant wrote the first letter to Mr. Mornay, without being called upon by him so to do. The second letter, which contained the libellous matter in respect of which the plaintiff claimed to recover damages, was certainly written in answer to inquiries made by Mornay; but inasmuch as those inquiries were invited by the defendant, I thought it was a question for the jury, whether the communication contained in that letter was made by the defendant bona fide, acting under a belief that he was discharging a duty which he owed to the party who was about to take the plaintiff into his service, or whether it was made maliciously with an intention of doing an injury to the plaintiff. The jury found that it was made maliciously, which entitled the plaintiff to a verdict.

BAYLEY, J. Assuming that the libel set out in the second count was a privileged communication, it seems to me that the case was properly submitted to the jury. Generally speaking, any thing said or written by a master when he gives the character of a servant is a privileged communication. If a servant, therefore, charge a master with publishing a libel, it is competent to the latter, under the general issue, to prove that the alleged libel was written under such circumstances as to make it a privileged communication, and thereby throw on the plaintiff the necessity of showing that it does not come within that protection which the law gives to a privileged communication. But if the supposed libel be not



communicated bona fide, it does not fall within the protection which the law extends to privileged communications. Here the second letter of the defendant was written in answer to one calling upon him to give an account of the plaintiff's conduct, but the defendant wrote his first letter without being called upon so to do. I do not mean to say that in order to make libellous matter written by a master privileged, it is essential that the party who makes the communication should be put into action in consequence of a third party's putting questions to him. I am of opinion he may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion, and do some act to induce that other to seek information from and put questions to him. The answers to such questions, given bona fide with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury, whether the defendant has acted bona fide, intending honestly to discharge a duty; or whether he has acted maliciously, intending to do an injury to the servant. In forming their judgment, the jury in this case were bound to take into their consideration the fact of the defendant's having voluntarily put himself into motion, and thereby in effect having, by the first letter, desired Mr. Mornay to put questions to him. These questions were put, and gave occasion to the second letter. The question for the jury to consider was, whether the defendant acted honestly and bona fide in making the representation contained in that letter. The jury had that question submitted to their consideration, and they were of opinion that the communication was not made bona fide, but that it was made with the intention to injure the plaintiff; and if it was made with that intention, it was not a privileged communication.

LITLEDALE, J. It seems to me that the letter, taken by itself, is a libel; but if it was a privileged communication, it was not necessary for the defendant to plead a justification; he might make that a defence on the general issue, and give evidence to satisfy the jury, that under the circumstances of the case it was a bona fide communication. That question was properly submitted to their consideration, and they have come to a conclusion that it was not made bona fide, and that the defendant was actuated by malice. I perhaps should not have come to the same conclusion; but I think the verdict ought not to be disturbed. Upon the question, whether a master who has written a libel in giving the character of a servant has acted bona fide or not, it may make a very material difference whether he volunteered to give the character, or had been called upon so to do. At all events, when he volunteers to give the character, stronger evidence will be required that he acted bona fide, than in the case where he has given the character after being required so to do.

Rule refused.

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LINDENAU v. DESBOROUGH.—p. 586.

It is the duty of a party effecting an insurance on life or property, to communicate to the underwriter all material facts within his knowledge touching the subject matter of the insurance; and it is a question for the jury whether any particular fact was or was not material.

Assumpsit against the secretary of the Atlas Insurance Company,

on a policy of insurance on the life of the Duke of Saxe Gotha. Plea, the general issue. At the trial, before Lord *Tenterden*, C. J., it appeared that in 1824, an insurance was effected on the life of the duke with the Union Assurance Company. That company had an agent in Germany, who, on behalf of his principals, submitted certain questions to the physicians of the duke, many of them as to specific diseases, and his habits of life; and the last was, "Is there any other circumstance within your knowledge which the directors ought to be acquainted with?" and this was answered in the negative. There was also a private certificate sent by the agent to the directors in answer to their inquiries as to certain points. In this also there was a general question—"Do you know any other circumstance which ought to be communicated to the directors?" which was answered as follows: "Agreeably to our informations, the duke has led a dissolute life in former days, by which he has lost the use of his speech, and, according to some informations, also that of his mental faculties, which, however, is contradicted by the medical men; and as little as we believe that this has any influence on his natural life, we find it our duty to mention it." The physicians in one of their answers said the duke was hindered in his speech, but did not mention the state of his mental faculties. An application was made to the Union to insure a further sum on the duke's life; but that being contrary to their general rules, their agent handed over the proposal to the Atlas, and at the same time gave the latter company the private answers received from their agent in Germany. The plaintiff signed the usual declaration, and declarations by the duke's physicians were made to the Atlas similar to those made to the Union. Upon receiving these documents the Atlas entered into the policy. In 1825 the duke died, and it was then discovered that there had existed in his head for many years a large tumor pressing on the brain, to which the loss of speech and mental faculties might be attributed; but all the medical testimony went to establish that the symptoms during the duke's life were not such as were likely to excite suspicion that such a tumor existed, or that he was afflicted with any particular disorder tending to shorten life. One foreign physician, however, said, that had he been consulted he should have thought it right to state that he attributed the loss of speech to a paralysis of the organs of speech. And an English surgeon, called for the plaintiff, on cross-examination, said he should, in answer to the general question, "Whether he knew any other circumstances that ought to be communicated to the directors," have thought it right to mention the state of the duke's mental faculties. Upon hearing this evidence Lord *Tenterden* told the plaintiff's counsel he thought it made an end of his case; and he should leave it to the jury to say whether there were any facts material to be known which were not mentioned to the assurers, and that if there were, the policy was void. The plaintiff's counsel thereupon elected to be nonsuited, leave being given to him to move for a new trial, on the ground of misdirection.

*Brougham* now moved accordingly. The proposed direction to the jury cannot be supported, inasmuch as it referred the materiality of the fact not mentioned to the judgment of the jury, and not to the opinion of the party making the declaration. To specific questions the party must truly answer whether they are material or not; but to a general question the answer is sufficient, unless the party conceal that which he believed

to be material. If the contrary were the law, no policy could be effected with safety, for the most skilful men differ upon such questions; and a party having bona fide given all the information that a skilful adviser thinks material may afterwards find his insurance of no avail, because another person at some future time thinks a fact not mentioned was material. [*Bayley, J.* Can you support the position that the materiality is to depend on the opinion of the party insuring, and not on the real state of the fact?] In *Mayne v. Walter*, Park, Ins. 531, Lord *Mansfield* said, "It must be a fraudulent concealment to vitiate a policy." [*Bayley, J.* In *Huguenin v. Rayley*, 6 Taunt. 186, it was held to be a question for the jury whether a fact not communicated was material.] That certainly is one question for the jury; and because it had not been left to them, the nonsuit which had there been directed was set aside: but it is also a question for the jury whether the party believed the fact to be material. But, secondly, supposing the materiality to have been properly referred to the jury in this case, it should have also been left to them to say whether the insurers had not information aliunde of the fact omitted by the physicians. In *Carter v. Boehm*, 3 Burr. 1910, Lord *Mansfield* says, "An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew; what way soever he came to the knowledge. Now it appeared in evidence that the private communication made to the Union Assurance Company had been delivered over to the Atlas, and in that the duke's loss of speech and the imbecility of his mental faculties were mentioned. Thirdly, the fact of the duke's want of mental faculty did not affect his apparent bodily health; no one of the medical witnesses affected to say that he should have considered the risk increased on that account, and taking the case most strongly against the assured, he warrants a state of apparent bodily health. Now the assured need not mention anything covered by the warranty, *Haywood v. Rodgers*, 4 East, 590; and had such a warranty been expressed in this case, the question for the jury would have been, whether the party was in a reasonably good state of health, and such a life as ought to be insured on common terms, *Ross v. Bradshaw*, 1 W. Bl. 312, and the jury must have answered such a question in the affirmative. [*Bayley, J.* In *Bufe v. Turner*, 6 Taunt. 338, it appeared that the plaintiff was possessed of several warehouses; one of which was adjoining to a boat-builder's shop. A fire broke out in this shop, but was subdued and apparently extinguished. The plaintiff immediately afterwards sent an order to effect an insurance on his premises. On the following morning the fire again broke out at the boat-builder's, and consumed the plaintiff's warehouses. The jury acquitted the plaintiff of any fraud or dishonest design, but thought he should have communicated to the underwriters the circumstance of the fire that had happened before he ordered the insurance; and because he did not do so returned a verdict for the defendant, and the Court afterwards refused to grant a new trial.] The report does not state on what ground the new trial was refused.

Lord TENTERDEN, C. J. At the trial before me, amongst other depositions, that of a foreign physician named Stark was read, wherein he stated that he would have certified that the duke was in bodily health, but that he would not have failed to observe that he labored under an inability to speak, which he attributed to a paralytic state of the nerves of the organs of speech. In addition to this, Mr. Green, a surgeon, stated, that if consulted he should have thought it right to mention the

state of the duke's mental faculties; whereupon I expressed an opinion that the cause was at an end, and said that I should direct the jury to find for the defendant if they thought the plaintiff had failed to communicate to the insurers any material circumstance within his knowledge. The only question now is, whether that direction would have been correct or not. At the time of the trial I had in my recollection, although not very accurately, the case of *Morrison v. Muspratt*, 4 Bing. 60, which was tried before me at Lincoln. By the printed report it appears that in April, 1823, an insurance was effected upon the life of a lady, who, at the end of 1822, had suffered from a pulmonary attack, and was attended by a surgeon. In March, 1823, a medical practitioner who had known her for some years, but did not attend her during that illness, was sent for to examine her, with a view to effecting the insurance in question; and he certified that she was in good health. In 1824, she died of a pulmonary disease. I left it to the jury generally to say whether any misrepresentation had been made; and the jury having found a verdict for the plaintiff, the Court of Common Pleas granted a new trial, on the ground that the jury ought to have been called upon to say whether it was material for the defendants to have been made acquainted with the illness of the lady in 1822. In the present case, the insurance was upon the life of a foreigner. It appeared that a previous insurance had been effected with an office that had an agent abroad. That office was requested to make a further insurance, and being unwilling to do so, the secretary handed over to the defendant the certificate received from their foreign agent. If that had distinctly disclosed the fact now in question, I am not prepared to say that the defendant would have had any ground of complaint; but the state of the duke's faculties is not distinctly stated in that certificate. Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any reasonable man would think material. It certainly seems to me that the circumstances proved as to the state of the Duke of Saxe Gotha's mental faculties were material; and, upon the authority of the cases of *Morrison v. Muspratt* and *Bufe v. Turner*, I think I should not have done wrong in leaving the case to the jury in the manner proposed at the trial.

BAYLEY, J. I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material; and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach. Besides the cases already mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship. On these grounds and authorities, I am of opinion that the proper question for the jury was not whether the party believed the information withheld to be material, but whether it was in fact material.

LITLEDALE, J. I am of the same opinion. It is the duty of the assured in all cases to disclose all material facts within their knowledge. In cases of life insurance certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which, had they been known, would no doubt have been made the subject of specific inquiries. The general question appears to have been proposed in order to meet such cases, and I think the question on such a policy is not whether a certain individual thought a particular fact material, but whether it was in truth material; and of that the jury are by law constituted the judges. I therefore think the proposed direction would have been right, and that the nonsuit ought not to be disturbed.

Rule refused

### The KING v. The Justices of LANCASHIRE.—p. 593.(a)

By the statute 4 G. 4, c. 95, s. 87, a right of appeal is given in certain cases, if the party gives notice within six days after the cause of complaint arises. Two justices having made an order upon the surveyors of the roads in a township to perform a certain part of the statute duty on a turnpike road running through the township, and to pay to the surveyor of that road a certain part of the money received as a composition for statute duty: Held, that the cause of complaint did not arise until a copy of the order in writing had been served, and that notice of appeal given within six days from that time was valid.

A RULE nisi had been obtained for a mandamus to the Justices of Lancashire, commanding them to enter continuances, and hear an appeal against an order of two justices, whereby they appointed the inhabitants of the township of Mosley to perform a certain part of their statute work upon a certain turnpike road within that township, and that a certain portion of the money received by the surveyors of the highways of that township as a composition for statute work, should be paid to the trustees of the turnpike road. It appeared by the affidavits that a list of persons liable to do statute work or compound for it within the township of Mosley, had been obtained by the surveyor of the turnpike road, and by him laid before two justices, in pursuance of the 4 G. 4, c. 95, s. 80; (b) that notice

(a) This case was heard and determined at the sittings in banc after last term.

(b) By s. 80 of that statute it is enacted, "That the surveyor of the highways for every parish, &c., shall, on an order in writing made by the justices, on an application to them by the trustees or commissioners of the turnpike road, and delivered to such surveyor, or left at his last or usual place of abode, bring and deliver, within ten days afterwards, to the turnpike surveyor, lists, in writing, of the names of the several persons who, within such parish, &c., are by law liable to do statute work, or to the payment of money in lieu of or as a composition for such statute work, distinguishing the nature of the work to be done, and also the amount of the respective sums to be paid; and the turnpike surveyor having received such lists shall, within fourteen days afterwards, give a notice to the surveyor or surveyors of the highways of the time, when such lists will be laid before the justices, in order to apportion the said statute-duty, and at the time appointed by such notice, the lists shall be laid before the justices by the turnpike surveyor, in the presence of the surveyor of the highways (if he shall attend), and the said justices shall order and direct the surveyor or surveyors of such parishes, &c., respectively to pay over to the trustees or commissioners such proportion of the composition money for statute work, as they, the justices, shall think proper, and at such times as the justices shall direct; and in case the surveyor or surveyors of the highway shall refuse or neglect to give in any such lists as aforesaid, or shall refuse or neglect to collect or pay over such composition money, every such surveyor so offending shall, for every such offence, forfeit and pay any sum not exceeding 10*l*.

By s. 87, it is enacted, "That if any person shall think himself aggrieved by any order, judgment, or determination made by any justice or justices of the peace, &c., in

of the meeting was given to the surveyors of the township who attended on the 5th of March, when the justices expressed their determination to make the order in question. On the 10th a copy of the order was served on the surveyors of the township, who on the 14th gave notice of appeal, and entered into the recognisance required by the statute. At the sessions, when the appeal came on to be heard, it was objected for the respondents, that the notice of appeal was too late, the statute 4 G. 4, c. 95. s. 87, requiring the notice to be given within six days after the cause of complaint shall arise; that the cause of complaint in this case was the order of justices made on the 5th of March, and that consequently the notice of appeal given on the 14th was too late. Upon this objection the appeal was dismissed.

*Armstrong* showed cause, and contended that the construction of this statute ought to follow that upon the 13 G. 3, c. 78. In *Rex v. The Justices of Pembrokeshire*, 2 East, 213, it appeared that under the nineteenth section of that act an order had been made, and a highway had been stopped up under it. A sessions intervened between the order and the actual stopping up of the highway, and the Court held that the appeal should have been to the next sessions after the making of the order, and that an appeal to the next sessions after the road was stopped up was too late. And in *Rex v. The Justices of Staffordshire*, 3 East. it was held that the appeal should be to the next sessions after the making of the order, without reference to the time of giving notice of the order.

*Coltman*, contra. The case of *Rex v. The Justices of Staffordshire* proceeded upon the peculiar wording of the statute 13 G. 3, c. 78, which limited the appeal to the next sessions "after the order made." Here the notice of appeal is to be given "within six days after the cause of complaint shall arise." Now there could be no cause of complaint until the order was served, for until then no proceeding could be taken upon it. *Rex v. The Justices of Devon*, 3 East, 151, is very like this; there an appeal was given in similar terms; a distress warrant was issued, under which the parties' goods were seized; and it was held, that the cause of complaint was the seizure of the goods, not the granting of the warrant. Besides, in the present case, the appellant was bound to state the matter of his appeal, which he could not do until he had been served with a copy of the order.

BAYLEY, J. I think that the rule for the mandamus must be made absolute. It appears to me that the order of the magistrates was not complete until the party was in possession of the order, and that the cause of complaint arose when that order was served. In proceeding under the statute in question the list of persons liable to statute duty is first to be obtained, a time is fixed for a meeting, and then the surveyor of the township is to have notice to attend. At the meeting the list is to be laid before the justices in the presence of the surveyor, "if he shall attend," but he is not bound to attend. Then the justices may pursuant of this act (except where the order, judgment, &c., are hereby declared to be final, and except under the particular circumstances hereinafter mentioned), such persons may appeal to the justices at the next general or quarter sessions of the peace to be held for the county, &c., wherein the cause of complaint shall arise, such appellant first giving to such justice, &c., by whose act such person shall think himself aggrieved, notice in writing of his intention to bring such appeal, and the matter thereof, within six days after the cause of such complaint shall arise, and within four days after such notice, entering into recognizance before some justice of the peace, with two sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such general or quarter sessions, and also to pay the penalty or forfeiture in case the conviction should be affirmed."

make an order for the performance of statute duty, &c. But they are not bound to order that every man liable to the performance of statute duty shall do it on the turnpike road. They may order certain persons to do it, and from the nature of the thing that order must be in writing, as it would be impossible for the surveyor to keep it in his mind. In addition to this, the justices have power to order the composition money to be paid over at any "time or times." Here, although the proportion to be paid was verbally fixed, nothing was said as to the time of payment; and, therefore, the order was not complete; nor could it be complete until served upon the party to be bound by it. Parties are often present in this Court when rules are pronounced, but they are not bound to take notice of them until they are served. The appeal clause in this act plainly contemplates that the order and direction shall be communicated to the party, for he is to give notice of the ground and matter of his appeal, which he could not otherwise do. Again, the statute does not make it imperative on the surveyor of the township roads to attend before the magistrates; if he does not, of course the order must be served; and it is very desirable to have one uniform course of practice, whether the surveyor does or does not attend. Upon these grounds it appears to me that the notice of appeal being given within six days after the order in writing was served, was in good time; and that the rule for a mandamus must be absolute.

HOLROYD and LITLEDALE, Js., concurred.

Rule absolute.

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CROWDER and Another v. P. LONG, Gent., one, &c. — p. 598.

*A fieri facias* issued against the goods of A. The goods were seized by the bailiff. The execution creditor authorized the bailiff to quit possession, the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Before the sale, another *fi. fa.* issued at the suit of a second creditor. To that writ the sheriff returned *nulla bona*. The second creditor brought an action for a false return, and recovered the value of the debtor's goods against the sheriff. The sheriff, having previously paid the value of such goods to the creditor under the first *fi. fa.*, brought an action to recover from him that money: Held, that he was entitled to recover the same, unless it were shown by the defendant that at the time when the sheriff made the payment he was acquainted with the fact of the misconduct of his officer, and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with knowledge of the misconduct of his officer.

*Assumpsit* for money had and received. Plea, general issue. At the trial, before Lord *Tenterden*, C. J., at the London sittings after last term, the following appeared to be the facts of the case: In 1825, the plaintiffs were sheriffs of London. The defendant was an attorney, and in November in that year, one Rowley was indebted to him in a large sum. Rowley also had a creditor of the name of Rounds, and having been pressed for payment, consulted the defendant Long professionally on the subject. The defendant advised Rowley to execute to him, the defendant, a warrant of attorney to confess judgment; and, at the defendant's suggestion, one Jackson, an attorney, was employed to prepare the warrant of attorney. On the 18th of November, Rowley executed the warrant of attorney for securing the sum of 447*l.* 9*s.*, and on the same day judgment was entered up, and a writ of *fi. fa.* issued against the goods of Rowley, returnable on Monday next after fifteen days of St. Martin. writ was delivered to one Denham, an officer of the plaintiffs, and

he by virtue of that writ seized the goods of Rowley. On the 26th of November, 1825, Jackson directed Denham, on payment of the sheriff's poundage and officer's fees, to discharge the goods of Rowley taken in execution, and leave the warrant in the hands of one Wood. Wood was a servant of Rowley. Rowley signed a consent in writing that the plaintiffs and their officer might hold possession of his goods, and that they might continue in such possession or reënter after the writ was returnable, and that they might sell on the premises, and that he would pay all expenses attending the sale. On the 26th of November, the execution was withdrawn, and on the 13th of December, Rowley paid the sheriff's poundage to Denham. In Hilary term, 1826, Long, the defendant, ruled the plaintiffs to return the writ, and they returned that the goods remained in their hands unsold for want of buyers. In May, 1826, Long directed the officer to proceed to a sale of the goods, and on the 26th of that month notice of the intended sale was published, and on the 27th Rowley's goods were sold. In that month another *fi. fa.*, at the suit of one T. Wade, was issued against the goods of Rowley, and delivered to the plaintiffs to be executed. In July, after the sale of the goods, and whilst the proceeds remained in the hands of the plaintiffs, Wade gave notice to them not to pay over the proceeds of the sale to the defendant Long. The plaintiffs then requested Long to indemnify them, which he refused to do. In November, 1826, the plaintiffs paid over to the defendant 200*l.*, being the proceeds of the sale, and returned *nulla bona* to the *fi. fa.* issued at the suit of Wade. The latter brought an action against the plaintiffs for a false return, and recovered against them a verdict for 200*l.*; and they paid Wade the damages and 95*l.* for costs. The present action was brought by the plaintiffs to recover from the defendants the 200*l.* which they had paid him as the proceeds of the goods, and 95*l.*, the costs incurred in the action brought against them by Wade. It was objected that the plaintiffs were not entitled to recover, because they must have paid the money to the defendant with a full knowledge of all the facts. First, it was clear that Denham was acquainted with the fact of the execution having been withdrawn, and it could not be doubted that he had communicated that fact to the plaintiffs, his employers. But, secondly, assuming that he had not done so, still, in point of law, the plaintiffs must be taken to have known every thing that their officer knew; for the act of the officer is the act of the sheriff, and the knowledge of the officer that of the sheriff. The fact, therefore, of the execution having been withdrawn with the assent of the defendant, must be taken to have been known to the plaintiffs at the time when they made the payment to the defendant. Lord *Tenterden*, C. J., told the jury that, in point of law, it was not competent to a creditor to put in an execution, withdraw it, and afterwards renew it. When the execution was withdrawn by Long, there was an end of it. Wade became entitled to recover against the sheriff by reason of the defendant's execution having been withdrawn with his assent. It was true that if a man pays money with a full knowledge of all the facts, he cannot recover it back again. The question for the jury was, whether the plaintiffs at the time when they made the payment to the defendant were acquainted with the fact of the execution having been withdrawn by the authority of the defendant. Denham undoubtedly knew that fact, and generally speaking, the sheriffs are liable for all acts done by the officer by their authority, but not for acts done without their authority at the request of an execu-



tion creditor. He directed the jury to find for the defendant, if they thought that the sheriffs knew everything the officer knew; but if not, for the plaintiffs. The jury having found for the plaintiffs, damages 186*l.*,

*Joshua Evans* now moved for a new trial. Assuming that the present action is the action of the sheriff's officer, it is quite clear that he cannot recover back this money. It was his duty to have continued in possession, and he ought to have known that that was his duty. At all events, he knew all the facts of the case, and having paid the money with full knowledge of those facts, he cannot recover it back, *Brisbane v. Dacres*, 5 Taunt. 143, *Andrew v. Hancock*, 1 Brod. & B. 37, *Bramston v. Robins*, 4 Bing. 11, *Milnes v. Duncan*, 6 B. & C. 677, *Skyring v. Greenwood*, 4 B. & C. 281. Secondly, supposing this to be the action of the sheriffs, and not that of their officer, they cannot recover. It is an established rule that for all civil purposes the act of the bailiff is the act of the sheriff, *Woodgate v. Knatchbull*, 2 T. R. 151, *Pechell v. Layton*, 2 T. R. 712, *Tyte v. Glode*, 7 T. R. 267, *Parrott v. Mumford*, 2 Esp. 585, *Sturmy v. Smith*, 11 East, 25. So if upon a *fi. fa.* against A. a bailiff takes the goods of B., trespass lies against the sheriff, *Ackworth v. Kempe*, Doug. 40; and in *Saunderson v. Baker*, 3 Wils. 317, *Blackstone, J.*, says, "The law looks upon the sheriff and his officer as one person." So the sheriff is liable if his officer does not arrest a person against whom a writ has issued, *North v. Miles*, 1 Camp. 389. So an averment that G. and R. became bail at the request of the sheriff, is satisfied by proving that they became bail at the request of the bailiff. [*Bayley, J.* If the execution creditor authorise the bailiff to deviate from his duty, and the sheriff be thereby damnified, may not the execution creditor be liable for the damage so occasioned by that breach of duty so induced by his act? Is not such act of the bailiff, as between the sheriff and the execution creditor, to be considered the act of the latter? It is done by his authority.] The general rule is, that the act of the bailiff is the act of the sheriff. The latter, therefore, must be taken to have been cognizant of the misconduct of the officer, and to have paid this money to the defendant with full knowledge of all the facts of the case.

Lord TENTERDEN, C. J. I should be sorry to break in upon the general rule which applies to actions brought against a sheriff for breach of his duty in executing process, that the act of the bailiff is the act of the sheriff. But I think that, under the circumstances of this case, the act of the officer is not, as between the sheriffs and the defendant, to be considered the act of the sheriffs. The sheriffs have already been made answerable for the misconduct of their officer in the action brought against them by Wade for a false return. The return of nulla bona made by the sheriffs in that case would have been proper if the execution of the present defendant had been in force at the time when the writ issued at the suit of Wade; but the defendant's execution was not then in force, because the officer had improperly quitted possession, and upon that ground Wade recovered from the present plaintiffs the value of the goods seized by the sheriffs. The question which arose incidentally in that case was, whether Donham had been guilty of misconduct; and in the result it was found that he had. The question now is very different. It appeared that the act of the officer was done without the knowledge of the sheriffs, but with the full knowledge and assent of the defendant; and that the sheriffs were compelled in consequence of that misconduct of the officer so authorized by the defendant, to pay to a third person the value of those very goods, which they had already paid to the defendant. Now, it is quite clear that

the sheriffs are entitled to recover the money so paid to the defendant, unless at the time when such payment was made they were acquainted with the act of the misconduct of their officer. I think that, as between these parties, the act of the officer is not to be considered the act of the sheriffs, so as to make the latter by *implication* parties to the misconduct of the officer; but that it was incumbent upon the defendant to show that the sheriffs had actual knowledge at the time when they made that payment.

BAYLEY, J. According to the general rule, the act of the officer is, in point of law, the act of the sheriff. But the present case is an exception to that rule. If the officer be guilty of misconduct, and that misconduct is produced by the act of the execution creditor, it is not competent to the latter to say that the act of the officer done in breach of his duty to the sheriff, and induced by the execution creditor, is the act of the sheriff. The facts of this case are, an execution issued at the suit of the present defendant against Rowley. That execution, for any thing the sheriff knew, was an honest execution. It was the duty of the officer, as between himself and the sheriff, to seize the goods of the debtor, and sell them. But the present defendant (the execution creditor) desired the officer not to sell, but to go out of possession, and he did go out of possession. That was misconduct in the sheriffs' officer. But who induced that misconduct? The present defendant. The sheriff was not privy to it. That being so, it would be contrary to all principle to permit the defendant to say that that was the act of the sheriff. In May the officer reënters, and is directed by the defendant to sell the goods. But in that month another execution issued at the suit of Wade, and he insisted that the goods of the debtor were his. The sheriff returned nulla bona to Wade's writ, and he brought an action against the sheriff for a false return, to try the validity of Long's execution. The question in that action was, whether Long or Wade was entitled to the preference. It was decided that Wade was entitled to the preference. Then, in consequence of the misconduct of the officer, so induced by Long, the sheriff was compelled to pay Wade the value of the goods which he had previously paid to Long. Considering that there was collusion between Long and the officer, the sheriff ought not to be compelled to pay the value of the debtor's goods to both the creditors. I think, considering this as the action of the sheriffs, they are entitled to recover the money which Long ought never to have received. If it could be shown to be the action of the officer, then, perhaps, the rule in *pari conditione melior est conditio possidentis* would prevail. But here the money was paid by the sheriff to the defendant.

LITTTLEDALE, J. I am not disposed to break in upon the rule that the act of the officer must, in point of law, be considered the act of the sheriff. But we shall not break in upon that rule by our decision in this case. The rule is, that the act of the officer, in execution of the authority received from the sheriff, is the act of the sheriff. But here the act done by the officer, was an act done, not in pursuance, but in direct contravention of that authority; for the officer had authority from the sheriff to seize and sell the goods of the debtor, but he seized, and then gave up possession, and the sheriff was thereby compelled to pay the value of the goods seized to Wade. The sheriff, at the time when he paid the value of the goods to the defendant, had no knowledge of

the misconduct of his officer. That misconduct was induced by the act of the defendant. As between the sheriffs and the defendant, therefore, the act of the officer by which the sheriff has been damnified, was the act of the defendant, and not of the sheriff.

Rule refused.

See *Cook v. Palmer*, 6 B. & C. 739.

DOE, on the demise of LIDGBIRD, v. LAWSON and Another.—  
p. 606.

A fine was levied by A. in Hilary term, 1821. A. and B. claimed to be heir at law of C. There being several actions depending to try, whether A. or B. was heir at law, it was agreed that the rent should be paid into a banker's, to abide the event of one of those causes. The cause was decided in favor of A. in 1823, and the rent paid into the banker's was then paid over to him. It included half a year's rent due from the tenant on the 25th of March, 1821: Held, in an ejectment brought subsequently on the demise of B., in which he succeeded in showing that he was heir at law of C., that A. had no seisin in Hilary term, 1821, when the fine was levied, and consequently that the fine did not operate as a bar to the ejectment.

EJECTMENT for lands in the county of Kent. At the trial, before Lord *Tenterden*, C. J., at the Summer assizes for the county of Kent, 1828, the following appeared to be the facts of the case:—The lessor of the plaintiff claimed the premises in question as heir at law of Francis Lidgbird, who died in October, 1820, seised of the premises in question; the defendant, as devisee of Henry Wilding; and the question upon the merits was, whether the lessor of the plaintiff, or Henry Wilding, was the heir at law of Francis Lidgbird. The lessor of the plaintiff having proved his pedigree, and thereby established that he was the heir at law of F. Lidgbird, the defendant set up a fine levied by Henry Wilding in Hilary term, 1821, with proclamations made in that and the three following terms; and in order to show that Henry Wilding, the party levying the fine, was at that time seised of an estate of freehold in the premises in question, proved that Wilding, in April, 1821, having distrained upon the tenant of the premises in question for half a year's rent, due at Lady-day, 1821, the tenant replevied; and there being other actions depending between Wilding and other tenants of lands, of which F. Lidgbird died seised, in which it was intended to try the question, Whether the lessor of the plaintiff, or Wilding, was the heir at law of the person last seised, it was agreed between the respective attorneys that one cause only should be tried, and that the rents should be paid into a banker's to abide the event of that cause. In pursuance of that agreement, the half year's rent due at Lady-day, 1821, was, in March, 1822, paid into a banker's, and it was agreed that it should remain there until after the trial of the cause, and then be paid to Wilding, the defendant, in replevin, in case a verdict should be found for him, or otherwise to the plaintiff. That cause was tried at the Summer assizes, 1823, and a verdict was found for the defendant, and the rent was then paid over to the executors of Wilding, he having died in the mean time. It was insisted on the part of the defendants, that as the rent which became due on the 25th March, 1821, had been paid to the executors of Wilding, he must be taken to have been seised of a freehold by relation, from the time of the death of F. Lidgbird, in October, 1820, and, consequently, that he was so seised in Hilary term, 1821, when the fine was levied, and that an entry ought, therefore, to have been made to avoid it. The counsel on the other side relied upon Lord

*Townsend v. Ashe*, 3 Atk. 336, (more fully reported in Cruise, Dig. tit. 35, c. 5, s. 34, vol. v. 121), as an authority to show that a fine levied before any receipt of rent, by a person who had taken possession by wrong, has no effect, and that perception of the rent, after the levying of the fine, though for a period antecedent to the fine, was no evidence of a seisin, even at the time when that rent became due. Lord *Tenterden*, C. J., was of opinion, that Wilding, not having actually received any rent at the time when the fine was levied, had no seisin. A verdict having been found for the lessor of the plaintiff,

Sir *James Scarlett*, on a former day in the term, moved for a new trial. It is clear that if Wilding had received the rent of the premises in question at the time when he levied the fine, he would have had a sufficient seisin. Lord *Townsend v. Ashe*, 3 Atk. 336. Now he ultimately did receive the half-year's rent which accrued due at Lady-day, 1821. F. Lidgbird died in October, 1820. The rent received at Lady-day, 1821, was in respect of the preceding half-year. The payment of that rent to him was an acknowledgment by the tenant of a right in him accruing at the death of F. Lidgbird. The perception of that rent by him was evidence of a seisin in him commencing in October, 1820, when F. Lidgbird died. If that be so, Wilding was seised in Hilary term, 1821, when the fine was levied. In *Doe on the demise of Osborn v. Spencer*, 11 East, 495, Lord *Ellenborough* intimated, that the receipt of rent due after a fine levied for a period antecedent to such fine, was *prima facie* evidence of the party's possession of the premises by his tenant during the period for which the rent was received.

*Cur. adv. vult.*

Lord *TENTERDEN*, C. J., now delivered the judgment of the Court. The case of Lord *Townsend v. Ashe* was cited at the trial to show that the fine, under the peculiar circumstances of this case, did not operate, because the party who levied it had not then any seisin; and that case seems to be in point. There the fines were levied of shares in the New River, in Hilary term, 1733. At that time the parties who levied the fine had not received any profits of those shares, but on the 23d February, 1733, they received from The New River Company the first payment, which was due on the 25th December *preceding*, and they afterwards continued receiving the rents till 1740. It was contended, that as no profits had been received till after the fine levied, there was no disseisin, and, consequently, that the fine did not operate. To this it was answered, that the first payment, though not received till February, was due at Christmas, and that the receipt should relate to the time when the money was due. Upon this Lord *Hardwicke* said, "The answer given on the plaintiffs' part was, that no rent was received by the defendants till after the fines levied; and this I think a full answer, for till then there could be no disseisin. The profits were in the hands of the company at the time of the fines levied; and they must be considered as received by them for the party who had right, and not for a wrongdoer. Nor can the subsequent payment have relation to the receipt before that time; for fictions and relations in law are good to support right, but not to work wrong." Now, that case is an authority to show that the payment in 1823, of the rent which became due at Lady-day, 1821, was no evidence of a seisin in Wilding, even at the time when the rent became due. Here it was insisted that it was evidence of a seisin in Wilding in Hilary term, 1821, before it became due. Upon the authority of that case we think that Wilding was not seised when he levied the fine; and, consequently, that the fine did not operate, and was no bar to the present action.

## NORTON v. PICKERING. — p. 610.

A bill was drawn by A. upon B. for the accommodation of C., who indorsed it for value to D. Neither A. nor C. had any effects in the hands of B. The bill was dishonored by B.: Held, that the drawer was entitled to notice.

THIS was an action by the plaintiff, as the indorsee, against the defendant, as drawer of the following bill of exchange: "Two months after date payable to myself, or order, 50*l.*, value received." It was accepted by Sheppard and Co., indorsed by the defendant to Naylor and Ellis, and by them to the plaintiff. At the trial before *Bayley, J.*, at the Summer assizes for the county of York, 1828, it appeared that Naylor and Ellis, being indebted to the plaintiff for goods sold by him, requested the defendant to draw and indorse the bill, and Sheppard and Co. to accept the same; and Naylor and Ellis then indorsed the bill to the plaintiff. Neither Naylor and Ellis nor the defendant had any effects in the hands of Sheppard and Co. during the time the bill was running. No notice of the dishonor of the bill was given. The learned judge was of opinion that the defendant was entitled to notice of dishonor, and nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

*Milner* now moved accordingly. It was undoubtedly decided in *Cory v. Scott*, 3 B. & A. 619, that it was no excuse for not giving notice to the drawer that he had no effects in the drawee's hands, if the drawer would be entitled on taking up the bill to sue either the acceptor or any other party. But the decision in that case is at variance with *Walwyn v. St. Quintin*, 1 B. & P. 652. It is important to reconcile those decisions, if possible. It does not appear by the report of *Cory v. Scott*, whether the plaintiff was privy to the mode of concocting the bill. Here it appears that the bill was taken by the plaintiff for goods in the usual course of business, and that he did not know of nor was privy to the making of the bill. The defendant, by putting his name to the bill as drawer, subjected himself to all the liabilities of drawer. One of those liabilities is, that, not having effects in the hands of the acceptor, he is liable to pay the bill, although he has no notice of dishonour. It will alter the character in which he signed the bill if it be held that he is entitled to notice. The Court cannot look dehors the instrument itself, unless the person seeking to avail himself of it can be shown to have assented to some qualification of his liability.

LORD TENTERDEN, C. J. I think the case of *Cory v. Scott*, 3 B. & A. 619, was properly decided, and that it must govern the present case. It may be questionable whether it might not have been more conducive to the interests of commerce to have decided that the holder of a bill is not at liberty to give evidence of any circumstances to excuse the want of notice. Here the defendant does not seek to avail himself of circumstances dehors the bill. He being drawer of the bill, by the law of merchants, was entitled to notice of dishonor. The plaintiff does attempt to get rid of the law merchant, for he says the acceptor had no effects of the drawer in his hands. I think the defendant was entitled to notice of dishonor, and that the nonsuit was right.

Rule refused.

**HOLDERNESS and Another, Assignees of FOXTON, v. SHACK-ELS. — p. 612.**

A., B., and C., together with others, were part-owners of a ship engaged in the whale fishery. The usual mode of managing the cargo was, that on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of B., and sold by him, and the proceeds were applied towards the discharge of the expenses of the ship. The blubber was deposited in a warehouse rented of C. by the owners of the ship, and the oil produced from it was then put into casks, each owner's share being weighed out, and placed separately in the warehouse, in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid. In that case, the warehouseman used to detain the oil till the ship's husband's demand had been satisfied. The ship having arrived from her voyage in 1825, the above course was followed. The share weighed out and set apart for A. was twenty-nine tons, which was stowed in the warehouse in casks, which had A.'s initials put on them. In January, 1826, A. became bankrupt. Twenty tons of the oil had been delivered to A. before his bankruptcy; the remaining nine tons remained in the warehouse at the time of his bankruptcy. In January, 1826, the warehouseman had orders from C., the ship's husband, not to deliver to A. the remaining oil, as his share of the disbursements of the ship had not been paid: Held, in an action of trover brought by the assignees of A. against C., for the residue of A.'s oil, that the other part-owners had originally a lien on it for his share of the disbursements of the ship, and that this right was not divested by the separation of A.'s share from the residue, and placing it in casks marked with his name.

**TROVER** for twenty tons of whale-oil, of the value of 1000*l*. The first count of the declaration alleged the property to belong to the bankrupt before his bankruptcy; second count stated the property to be in the plaintiffs, as his assignees. Plea, general issue. At the trial, before *Bayley, J.*, at the last Spring assizes for the county of York, a verdict was found for the plaintiffs, damages 220*l*. 10*s.*, subject to the opinion of this Court on the following case: —

The plaintiffs were the assignees of Foxton, under a commission dated the 2d of May, 1826, and their title to sue in that character was fully proved. The bankrupt Foxton, jointly with one Locking and the defendant, and some other persons, was part-owner of the ship *Jane*, a vessel belonging to Hull, engaged in the whale fishery. Locking was the ship's husband. The usual mode of managing the cargo was as follows: On the arrival of the vessel at Hull from the fishery, the whalebone was taken into the possession of Locking, and sold by him for the part-discharge of the expenses of the ship. The blubber was landed and deposited in a yard belonging to the defendant, in which were several warehouses, each of which was appropriated to a particular ship. One of these was rented from the defendant by the owners of the ship *Jane*, and appropriated exclusively to that ship. The blubber was boiled in a boiling-house in the yard by one Gilchrist, employed at the defendant's yard as foreman, and paid by the owners of the several ships; and for this a certain price per ton was charged by the defendant. The blubber, being then reduced into the shape of oil, was put into casks: each part-owner's share was then weighed out, and placed separately in the warehouse rented by the owners of the ship; and the particular casks containing his oil were marked with his initials in chalk. Gilchrist kept the key of the warehouse, and lived in the yard. After each division, the practice was for

him to deliver to the separate orders of each owner the oil belonging to them, unless previously to the delivery he received a notification from the ship's husband, that the part-owners's share of the disbursements had not been paid to him. In that case, he used to detain the oil till the ship's husband's demand had been satisfied. It was optional for the owner to have his oil in his own or the ship's casks. In the latter case, he was to send away the oil in the ship's casks, he returning the casks or paying for them when wanted. In June, 1825, the ship *Jane* arrived with a cargo, and the above being the usual course, was followed on that occasion. The share weighed and set apart for the bankrupt Foxton, before his bankruptcy, was twenty-nine tons and thirty-six gallons. Part of this was stowed in the ship's casks. All the casks were set apart in the ship's warehouse, and had the bankrupt's initials upon them in chalk. Foxton, before his bankruptcy, gave various delivery-orders to Gilchrist, under which twenty tons of this oil had been delivered. The remainder, being nine tons thirty-six gallons, being all in the ship's casks, remained in the ship's warehouse at the time of the bankruptcy. In January, 1826, Gilchrist had orders from Locking, as the ship's husband, not to deliver to Foxton the remaining oil, as his share of the disbursements of the ship was not paid. Locking, the ship's husband, became bankrupt in April, 1826. Foxton stopped payment in January, 1826. There were two accounts between Locking and Foxton, one being the ship's account, and the other a general account-current. In the ship's account it appeared, that after charging every disbursement on account of the vessel, as if they had actually been paid by him, (except the rent of the warehouse and the charges of boiling, which remained due to the defendant,) and after giving credit for the sale of the whalebone, and a small portion of oil, there remained due from the bankrupt Foxton, at the time of his bankruptcy, in respect of his share of the ship, the sum of 564*l.* 12*s.* This sum was due to the defendant and the other owners. The other owners have paid up Foxton's share by making deductions from balances which Locking owed them. Locking had not paid every disbursement before he failed; he has paid them since by money received from the other owners. Upon the general account-current, there was a balance against Locking of 261*l.* 7*s.* 4½*d.* But Foxton had credit therein for two of his own acceptances for 300*l.* and 450*l.*, which were afterwards dishonored. On the 8th of January last, the plaintiffs, as assignees of Foxton, formally demanded possession of the nine tons thirty-six gallons of oil from the defendant, offering to pay to him a sum which exceeded what he demanded in respect of rent and charges for boiling the blubber. This sum he had himself, by an account in his own hand-writing, fixed at 59*l.* 6*s.* In answer to this demand, the defendant stated that he wished the matter to stand over for a few days. Accordingly, on the 31st of January, the plaintiff Holderness called again upon the defendant, and tendered to him the sum due in respect of his demand for rent and boiling, but the defendant then absolutely refused to receive the moneys or give up the oil. He, however, stated, that the oil was in his possession and under his control, and that he could give it up if he thought proper; but he added, that the owners of the *Jane* had instructed him not to do so. The value of the oil so detained was 220*l.* 10*s.*

*E. H. Alderson* for the plaintiffs. The defendants, who were part

owners of the ship, had clearly no lien on the oil, even if it had not been separated from the residue. Secondly, if they had any lien in point of law, still, in fact, there was nothing due from Foxton at the time of his bankruptcy to the other part-owners. Thirdly, assuming that there was such a debt, and that the part-owners had a lien, still the separation of this oil from the residue, and the putting of Foxton's name on the casks in which it was contained, was an appropriation, and vested the property in him. As to the first point, *Smith v. De Silva*, Cowp. 469, is an authority to show that the plaintiffs are entitled to recover. There the outfit had been conducted by De Silva, who was appointed to manage the concern as ship's husband in pursuance of an agreement made by three others at the time of their becoming owners of the ship; and De Silva settled the accounts with them, and took from one of them, who afterwards became bankrupt, promissory notes, payable at a future day, for a part of his share of the expense: it was held, that the assignees of the bankrupt were entitled to receive the full share of the profits, and that the ship's husband (who had after his appointment acquired an interest in the ship by purchasing a part of the share of one of the other part-owners) was only entitled to a dividend under the commission for the amount of the notes. In that case no distinction was made between the bankrupt's share in the ship and his share in the profits of the adventure. In *Doddington v. Hallett*, 1 Ves. 497, several persons had entered into a contract with one Hall, empowering him to build and fit out a ship at their joint expense, for the service of the East India Company, and he having died insolvent without paying his portion of the expense, the others, who remained answerable to the tradesmen for the whole, filed a bill against his administrator, praying that they might have a specific lien upon what should be due to him for his share to this extent. Lord *Hardwicke* held, that the other part-owners had a specific lien on his share for what they had paid or were liable to pay. The case has, however, been overruled in *Ex parte Young*, 2 Ves. & B. 242, and *Ex parte Harrison*, 2 Rose, B. C. 76, by Lord *Eldon*, who decided, that part-owners of a ship, being tenants in common, and not joint tenants, no lien attached on the share of one, a bankrupt, who had also been managing owner, for outfit, freight, &c., due to the others. Supposing that there was a lien, and that the other part-owners had a right to retain, here there was nothing due from the bankrupt to the other part-owners. The ship's husband took the whole upon himself. The debt, if any, was due from Foxton to Locking, and not to the other part-owners. The debt due to Locking could not give the defendant any lien. Assuming that there was a debt, and that the other part-owners had a right to retain for it that right was destroyed, because here the bankrupt had actual possession of the oil. The part belonging to him had been separated from the residue, and put into casks, which had his initials marked on them. It is true that the case states it to have been the custom not to deliver if the ship's husband was not satisfied; but here a delivery of part had taken place, and all the casks were marked with the name of the bankrupt, who was charged with warehouse-rent. *Hurry v. Mangles*, 1 Campb. 452, shows that, under such circumstances, there was an executed delivery of the whole. Besides, where a buyer removes from a warehouse a part of an entire quantity of goods sold at a fixed and entire price, it even puts an end to the right of stoppage in transitu, *Stoevel v. Hughes*, 14 East, 808, *Hammond v. Anderson*, 1 Bos. & Pul. N. R. 69.

*Parke*, contra, was stopped by the Court.



Lord TENTERDEN, C. J. This is not the case of a claim of lien on the share of the ship, but a claim by persons, being part-owners of a ship, engaged together in an adventure; and the subject-matter, in respect of which this action is brought, is part of the proceeds of that adventure, viz., part of the oil which had been obtained on a fishing voyage. Now, it is clearly established as a general principle of law, that if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects, until they first satisfy all that is due from him to the partnership. The case of *Smith v. De Silva*, Cowp. 469, is a very entangled case, and the facts stated in the report are not very clear or perspicuous. It appears that De Silva had originally made advances, not as part-owner of the ship, nor even as partner in the adventure, but as a person appointed by all the part-owners to manage the adventure for them, rather as their agent than as their partner. He afterwards acquired an interest by purchasing a part of the ship, and so became a partner in the adventure; but he was not an original partner. *Smith v. De Silva* may, therefore, have been properly decided, without breaking in on the general principle to which I have adverted. Then, supposing that the partners had in this case a lien originally, has any thing happened to take it away? First, it is said that they had no lien against Foxton, because nothing was due from Foxton to the then part-owners; but if the account be taken as between Foxton and Locking generally, there can be no question that the bankrupt was indebted to the other part-owners. For they were ultimately obliged to pay the expense which had been incurred before the bankruptcy. The next point turns on the separation of that portion of the oil which belonged to the bankrupt, upon which great reliance has been placed on the part of the plaintiff. It has been said, that there has been an appropriation of that quantity of oil to the bankrupt, and that the property thereby vested in him, and cannot be divested. But in order to decide whether the property vested in him or not, it is necessary to look at the practice of the part-owners of this ship in antecedent voyages, in order that we may know what was the effect of marking particular casks with the initials of any of the part-owners. The case states, that when the blubber had been reduced into oil, each part-owner's share was weighed out, and placed separately in the warehouse rented by the owners of the ship, and the particular casks containing his oil were marked with his initials in chalk; that Gilchrist kept the key of the warehouse and lived in the yard; that, after each division, the practice was for him (Gilchrist) to deliver to the separate orders of such owners the oil belonging to them, unless, previously to the delivery, he received a notification from the ship's husband that the part-owner's share of the disbursements had not been paid to him. In that case he used to detain the oil till the ship's husband's demand had been satisfied. That having been the practice between the parties, it appears to me that the separation of the oil of a particular part-owner from the residue, and putting his initials upon the casks, was not an absolute appropriation of the cask and its contents to that part-owner, but only a qualified appropriation enabling him to take the goods, unless the ship's husband afterwards prevented him by giving notice to the warehouseman. The particular circumstance of separating the oil in question from the residue, and putting on the cask which contained it the initials of Foxton, connected with the previous usage between the parties, appears to me to amount in this case not to an absolute

but to a qualified appropriation only. The property in the oil was thereby vested, but subject to be divested (as in point of fact it was) by the intervention of Locking. It seems to me that the justice and law of the case are with the defendant, and that there ought to be a judgment of nonsuit.

BAYLEY, J. Where there is a joint adventure which produces certain goods, the proper course is, first to deduct all the expenses which have been incurred in order to obtain those goods, and then to divide the residue among the shareholders, in proportion to the shares to which each is entitled respectively. In this case the joint adventurers obtained a quantity of oil in bulk. No partner, or representative of a partner, had a right to his aliquot part of that oil until he had paid his share of the expense of procuring it. That will be the case, whether the shareholder has become bankrupt or continues solvent. If he continues solvent, he may pay his share of the outfit, and of the expense. If he does not pay it in money, the other part-owners have a right to see that an aliquot part of what has been gained in the adventure be retained, so as to pay that share of the outfit which he ought to pay. In this case Foxton became bankrupt, and having become bankrupt, if he could have paid in money his share of the outfit, there would have been twenty-nine tons of oil coming to him. He could not pay, and, therefore, as it seems to me, the justice and the law of the case is, that his share of the expense should be paid out of the twenty-nine tons, and that, until he has paid his share of the expense, he cannot claim that quantity. It has been said, that there has in this case been a delivery, and that, in consequence of that delivery, the rights of Foxton, and of his assignees, are different from what they otherwise would have been. But it seems to me that there has not been a perfect delivery. It would have been perfect if the other part-owners had been dispossessed of the oil. That has not been done. The property still remained in the warehouse, and was the joint property of all. A part only has been removed. The removal of that part does not vary the right as to the residue. It is clear that the assignees cannot recover the twenty-nine tons before they pay Foxton's share of the expense. The other part-owners might say, there are twenty-nine tons allotted to you; you may take possession of all to which you will be entitled, but you must first pay your share of the expense; nine tons will be sufficient for that purpose; you may, therefore, take away twenty tons. The right of the other part-owners is not varied by their having allowed the bankrupt to take away twenty tons. That being so, the plaintiffs are not entitled to recover. It has been urged, that there has, in this case, been a change of possession, by reason of Locking's having debited the bankrupt in account with a portion of the rent. But that portion of the rent must have been paid by the bankrupt before he took away the oil, in specie; or it might have been deducted out of his share of the produce, if he compelled the other shareholders to sell, in order to pay his share of the expense. The usage being for the part-owners to detain the oil, until each part-owner's share of the expense has been paid, it seems to me, that the fact of debiting the party with warehouse rent can have no effect. I think, therefore, that the plaintiffs have not made out their right to the residue of the oil; and, consequently, that there ought to be a nonsuit.

Judgment for the defendants. (a)

## SIGOURNEY v. LLOYD and Others. — p. 622.

A bill of exchange drawn in America on a house in London, payable to order, was indorsed by the payee generally to A., and by him in these words: "Pay to B. or his order for my use." B. applied to his bankers to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of B.: Held, that the indorsement was restrictive; that the property in the bill remained in A., and that he was entitled to recover the amount of the bill from the bankers.

**ASSUMPSIT** for money had and received. Plea, general issue. The plaintiff was a merchant, residing at Boston, in the United States of America. The defendants were bankers in London, carrying on business under the firm of Messrs. Jones, Lloyd, and Co. Before the trial, the parties agreed that the plaintiff should take a verdict by consent for 3164*l.* 11*s.* 8*d.*, subject to the following case, with liberty for either party to turn it into a special verdict. This was accordingly done with the approbation of Lord *Tenterden*, C. J., before whom the cause came on for trial: —

In the month of July, Captain Attwood, who commanded a vessel belonging to the plaintiff, took in payment of a cargo of flour, the property of the plaintiff, which he sold at Rio Janeiro, a bill of exchange for 3164*l.* 11*s.* 8*d.*, drawn in a set of three by March, Sealy, Walker, and Co., of hat place, on March, Sealy, and Co., of London. This bill was payable to the order of Messrs. Hendricks, Wierss, and Co., who indorsed it to Captain Attwood. The following are copies of the first and third parts of the bill: —

"2971*l.* due 28th November.

"Rio de Janeiro, 12th July, 1825.

"For 3164*l.* 11*s.* 8*d.* 1258.

"At sixty days' sight pay this first of exchange, second and third not paid, to the order of Messrs. Hendricks, Wierss, and Co., three thousand one hundred and sixty-four pounds, eleven shillings, and eight pence, value of the same, which place to account, as per advice from

"MARCH, SEALY, WALKER, & Co."

This bill was indorsed by the payees to A. Attwood.

"Rio de Janeiro, the 12th July, 1825

"For 3164*l.* 11*s.* 8*d.*

"At sixty days' sight pay this third of exchange, first and second not paid, to the order of Messrs. Hendricks, Weirss, and Co., three thousand one hundred and sixty-four pounds, eleven shillings, and eight pence, value of the same, which place to account, as per advice from

"MARCH, SEALY, WALKER, & Co."

This was indorsed by the payees to A. Attwood, by Attwood to the plaintiff, by the latter in the following words: "Pay to Samuel Williams, Esq., of London, or his order, for my use;" and by S. Williams to Jones and Co.

Attwood sent the first of the set to the correspondent of the plaintiff, Mr. Samuel Williams, of London, who was an American agent and factor for merchants and planters, carrying on such business to a very great extent, enclosed in the following letter: "Sir, I herewith have the honor to enclose you the first of exchange for 3164*l.* 11*s.* 8*d.* sterling, at sixty days' sight, on Messrs. March, Sealy, and Co., in London, in favor of myself it being the proceeds of a cargo of flour in brig *Swiftsure*, belonging to Henry Sigourney, Esq., Boston, America, which you will please to

present for acceptance, and keep at the disposal of the second or third." But he did not indorse the bill. Williams received the letter and bill on the 26th September, 1825, and procured the acceptance of the bill in due course. The third of the set was remitted to the plaintiff; and he having indorsed it as aforesaid, "Pay to Mr. Samuel Williams, or order, for my use," remitted it to Williams in the following letter of the 17th September, 1825: "Captain Amaziah Attwood, of my brig Swiftsure, arrived here yesterday, Rio Janeiro, whence he sailed about the July. He informs me that he left a letter directed to you, to be forwarded to you by the next English mail, containing the first of March, Sealy, Walker, and Co's. draft on March, Sealy, and Co., London, dated 12th of July, at sixty days' sight, for 3164*l.* 11*s.* 8*d.* sterling, in favor of Messrs. Hendricks, Weirss, and Co., and by them indorsed to said A. Attwood. He thinks he did not indorse the draft; and if received, it can only be accepted. Enclosed you have third bill of the set indorsed to me by Captain Attwood, and to yourself by me. I presume that if the other should have been previously received and accepted, that a receipt on the one now transmitted would be accepted at maturity. Have the goodness when you advise the receipt, which I trust will be as soon as possible, of the present, to inform me the standing of the acceptors. Henry Sigourney." The letter and bill were received by Williams on the 21st October, 1826. The defendants had no notice of the before-mentioned letters of Captain Attwood and the plaintiff. Williams stopped payment on the 24th of October aforesaid, and a docket was struck against him on the 25th of the same month, upon which a commission, dated the 27th of the same month, was issued, and he was declared a bankrupt immediately afterwards. At the time Williams received the bill in question, as well as at the time of his bankruptcy, the balance of account was in favor of the plaintiff to the amount of upwards of 3000*l.*, exclusive of the before-stated bill. On the morning of the 22d of October, when the discount hereinafter mentioned was made, the balance in favor of Williams with the defendants was 3784*l.* 10*s.* 10*d.* About 11 o'clock on that day, Williams indorsed the bill in question, with others, amounting in the whole to 7081*l.* 17*s.* 9*d.*, to the defendants, who were his bankers, and in the habit of discounting for him very largely, and the said bills were bonâ fide discounted for him, and credit given to him for the amount, less the discount; and subsequently, viz., at the clearing house about 5 o'clock in the evening of that day, the defendant paid William's acceptances due that day to the number of thirty-two, and three drafts, amounting to 10,688*l.* 18*s.* 1*d.* The bill in question was honoured at maturity, and the amount received by the defendants on the 28th of November, 1825.

*F. Pollock* for the plaintiff. The bill belonged to the plaintiff, and he is entitled to recover its amount from the defendants. The indorsement was special, so as to prevent the indorsee from transferring any interest in the bill beyond the particular purpose or the particular individual mentioned in the indorsement. The earliest case where such a special indorsement is mentioned, is *Snee v. Prescott*, 1 Atk. 247. There Lord Hardwicke says, "Promissory notes and bills of exchange are frequently indorsed in this manner, *Pray, pay the money to my use*, in order to prevent their being filled up with such an indorsement as passes the interest." In *Edie v. The East India Company*, 2 Burr. 1227, *Wilmut, J.*, speaking of an indorser, says, "To be sure he may give a mere naked authority to a person to receive it for him: he may write upon it, '*Pray, pay the money to my servant, for my use;*' or use such expressions as necessarily import

that he does not mean to indorse it *over*, but is only authorising a particular person to receive it for him and for his *own use*. In such case it would be clear that no valuable consideration had been paid him. But, at least, that intention must *appear upon the face of the indorsement*." It appears, therefore, from these two authorities, that an indorsement in the form used in the present case will prevent the indorsee from passing the interest in the bill by a subsequent indorsement. The general indorsement of a bill makes it the legal property of the indorsee, and gives him the *jus disponendi*; but an indorsement for the use of another, is notice that the property in the bill is in that other, and that the holder is an agent for him, and cannot transfer the bill. [He was then stopped by the Court.]

*Parke, contra.* It may be conceded that the negotiability of a bill may be restrained by a special indorsement. The question, which in this case turns entirely on the construction of the indorsement, is whether it restrains the negotiability of the bill, and makes every subsequent holder a trustee for the plaintiff? The general rule is, that an indorsement transfers to the indorsee all the rights of the indorser, and, among others, the right of transferring the interest in the bill by indorsement: *More v. Manning*, Com. 311; *Acheson v. Fountain*, 1 Str. 557; *Edie v. East India Company*, 2 Burr. 1216. In the latter case, *Wilmot, J.*, even intimated a doubt whether there could be a restrictive indorsement. But, conceding that there may, the question is, whether the indorsement in this case contains clear negative words restraining the negotiability of the bill? The words must be construed most strongly against the plaintiff, the party using them. First, the bill is indorsed payable to order. *Prima facie*, therefore, it was transferrable. The legal title was in Williams, though, as between the plaintiff and him, he might be bound to hold the bill for the plaintiff's use; and if Williams had the legal title, he might transfer his interest in the bill by indorsement. The meaning of such an indorsement was considered in *Evans v. Cramlington*, Carth. 5, 2 Vent. 307, Skinn. 264, 1 Show. 4. These the bill was payable "to Price or order, for the use of Calvert." Price indorsed it to Evans; after which an extent issued against Calvert, and the money due upon it was seized to the use of the king. There facts appearing upon the pleadings, two points were made upon demurrer; the one, whether Calvert had such an interest in the money as might be extended; and the other, whether Price had power to indorse the bill, or whether he had only a bare authority to receive the money for the use of Calvert; and the Court of King's Bench, and afterwards the Exchequer Chamber, held that Calvert had not such an interest as could be extended, and that Price had power to indorse the bill, and judgment was given for the plaintiff. In the case, as reported in Shower, p. 4, Lord Holt says, "This is a bill which is assignable by Price, and when Price assigned it he received the money, and that receipt was for the use of Calvert; and there Calvert hath his action; but we can take notice of none but Price; and at this rate the credit of bills of exchange will be spoiled. [*Bayley, J.* The question was not raised there whether Price indorsed contrary to his duty to Calvert.] If Calvert's consent had been necessary, that must have been stated in the pleadings to have been given; but there is no such averment. The pleadings are set out in 2 Ventris, 307. That case, therefore, is an authority to show that Williams had authority to transfer the interest in the bill in this case. The words "to my use" may be construed as a direction from the plaintiff to Williams, his agent, to apply the bill, or the proceeds of it, to his, the plaintiff's use. The

other construction makes the indorsement restrictive. But the intention is not clear, and it ought to be so, in order to restrain the negotiability of the bill. If the first construction be adopted, the defendants clearly were not bound to see to the application of the money. If the words of the indorsement had been, "which place to my account," or "which hold to my use," the defendants would not have been bound to look to the application of the money. [Bayley, J. We do not know that the bill was intended to be negotiated. It probably was not, unless Sigourney gave authority.] The party to whom the bill was tendered is not bound to make any inquiry. According to the argument on the other side, every subsequent indorsee would be a trustee for the plaintiff. That would be very inconvenient. [Bayley, J. We are not bound to decide that all the subsequent indorsees will be trustees for the plaintiff.] The argument is equally good if it be confined to the case of the first indorsee. The question turns entirely on the intention of the indorser. In *Evans v. Cramlington*, Lord Holt says, that when Price assigned the bill, and received the money, he became trustee for Calvert. If that be so, then Williams, by indorsing for value to Lloyd, became trustee for the plaintiffs. That was before the bill became due. He could not make the defendants trustees for the plaintiffs. The reasonable construction of the indorsement is, that it was a direction by the principal to his selected agent to apply the proceeds to his use. If there were any fraud or other suspicious circumstances, the case might have been different. *Treuttel v. Barrandon*, 8 Taunt. 100, proceeded on that ground. [Bayley, J. Here the defendants were parties to the misapplication of the money.] They applied the money generally according to the directions of Williams; they could not know in what mode Williams was to apply the money to the use of the plaintiff. This was a bona fide discount in the way of trade to Williams himself. The defendants were not trustees for the plaintiff.

Lord TENTERDEN, C. J. I am of opinion that in this case the plaintiff is entitled to recover. It appears from the report of the case of *Snee v. Prescott*, 1 Atk. 247, that in 1743 an indorsement in this form was not unusual; and it appears to have been the opinion of Lord Hardwicke in that case, and also to have been the opinion of Mr. Justice Wilmot, in the case of *Edie v. The East India Company*, 2 Burr. 1227, that such an indorsement will have the effect of preventing a subsequent transfer of the bill for the benefit of any other than the person for whose use it is expressed to have been made by the indorsement. The case of *Ancher and Others v. The Bank of England*, Doug. 637, is an authority to the same effect. The indorsement was not precisely in the same form as in the present case; but the effect of it is the same. The indorsement there was, "The within must be credited to Captain Moreton L. Dahl, value in account." An indorsement purporting to have been made by Dahl was afterwards forged, and the Bank of England discounted the bill. The acceptors did not pay it; before it became due they had failed, and one Fulberg paid it for the honor of Ancher and Co., the plaintiffs; and upon the ground that the indorsement had restrained the negotiability of the bill, they brought an action for money had and received against the Bank. Lord Mansfield directed a nonsuit; but upon a rule to show cause why there should not be a new trial, and cause shown, Lord Mansfield, Willes, and Ashurst, Js., thought the indorsement restrictive, and that the plaintiffs were entitled to recover; but Buller, J., thought otherwise; upon which Lord Mansfield said, the whole turned on the question, whether the bill con

tinued negotiable ; and if they altered their opinion, they would mention the case again ; but it never was mentioned afterwards ; and upon a new trial, Lord *Mansfield* directed the jury to find for the plaintiff, which they did. It has been said that the indorsement " Pay to Williams for my use," is a mere direction to Williams to apply the money produced by the bill to Sigourney's use ; but the words taken in that sense would be useless ; for whether the words be on the face of the indorsement or not, as soon as Williams received the proceeds of the bill, he must necessarily apply them to Sigourney's use, and place them to his credit in the account between them. So that those words will have no effect whatever, unless they have that of restraining the negotiability of the bill, or at least of making the first indorsee (if he takes the bill with those words on it, as Williams did in this case) a trustee for the original indorser. The case of *Evans v. Cramlington*, when duly considered, does not seem to me to be sufficient to countervail the authorities to which I have already adverted. The bill in that case was drawn by Cramlington upon one Ryder, payable to T. Price or his order, for 500*l.* for the use of F. Calvert. Ryder accepted, but did not pay the bill. Price indorsed it to Evans for value. The latter brought an action against Cramlington, the drawer ; he pleaded that Calvert (who was named in the bill as the *cestui que use*) was an officer of the excise, and indebted to the king in such a sum, and that upon an exchequer process at the suit of the king, this 500*l.* was extended in his hands. To this plea there was a demurrer. It appears, therefore, that Cramlington, in answer to the claim of Evans, the indorsee, set up what is sometimes denominated the *jus tertii* ; and the only question which it was necessary for the Court to determine was, whether the bill, being in trust only for the use of Calvert, was liable to be seized under the extent against him. The Court was of opinion that it was not. The proposition of Cramlington, that the *jus tertii* intervened, failed entirely, and it became unnecessary to decide any other point. That case, therefore, as it seems to me, is not of sufficient weight to countervail the opinions delivered in *Snee v. Prescott*, 1 Atk. 247 ; *Edie v. The East India Company*, 2 Burr. 1216 ; and *Ancher v. The Bank of England*, Doug. 637. The use of indorsements of this kind is not small, nor are they, as it seems to me, inconsistent with the interests and convenience of commerce. Such an indorsement will not prevent the indorsee from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal all will be well, but the indorsee must look to him for the application of it. It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debts at the expense of his correspondent. I cannot see that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said, that it cannot be expected that the bankers or others, when requested to discount such bills as this, should look into the accounts between the principal and his agent. I agree, it cannot be expected they should ; but still if they take the bill so indorsed, they take it at their peril, and must be bound by the state of the accounts between those parties.

BAXLEY, J. The indorsement in this case is in the words " Pay to Williams or his order for my use." The question is, Whether the words " for my use " have or have not any effect with reference to the bill itself. The person who remits a bill may give private directions

to his correspondent in the letter in which the bill is enclosed, and if he means the directions to be private, they will be confined to the letter. But when he introduces the words "to my use" on the bill itself, he notifies to the world that he, the party indorsing, has not given to the indorsee a general, unlimited authority to apply it to his own purposes, but only to apply it to the use of him, the indorser. It has been suggested, that the most convenient construction to put on the words will be, to hold that the indorser meant thereby to direct Williams to apply the money to his, the indorser's use, but not to put the indorsee on his guard. My opinion is, that it is the most convenient construction which will most effectually protect the party, who appears by the form of the indorsement used by him to have thought that he required protection. It is said, Why introduce the words "or order"? The purposes of the indorser may, perhaps, have required that the bill should be indorsed. But before any person could honestly take that bill and advance money on it, he ought, seeing the words "for my use" on the bill, to have satisfied himself, from the correspondence and the state of the accounts between Sigourney and Williams, whether the latter was indorsing it for the benefit of Sigourney or for himself. And if such a person advances money upon a bill so indorsed without making such inquiry, he advances it at his peril. Now, in this instance the defendants advanced money on this bill without making any inquiry, and applied the whole of that money to the use of Williams. The bill was discounted on the 22d of October, the day after it was received. At that time Williams had more than 3000*l.* in the hands of the defendants. They discounted this and other bills to the amount of 7000*l.*, and in the course of the day all the money produced by this and other bills, to the amount of 10,000*l.*, was applied to the use of Williams, so that in the afternoon of that day they had in their hands 182*l.* only.

As to the case of *Evans v. Cramlington*, it is sufficient to say that that case came before the Court on demurrer, and that there was no question whether there had been any misapplication of the money which had been received by means of the bill. In this case there has been a misapplication of the money by the defendants. That is a sufficient distinction between this case and that of *Evans v. Cramlington*. For these reasons I am of opinion, that in this case the plaintiff, who made the special indorsement thereby effectually protected himself, and is entitled to the judgment of the Court.

Postea to the plaintiff. (a)

(a) *Littledale, J.*, was in the bail court.



JAY, Gent., one, &c. v. COAKS. — p. 635.

Where a judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the Master.



THE plaintiff, in December, 1827, delivered his bill of costs for business done for the defendant. The latter made no application for a Judge's order to tax the bill within a month after the delivery, but after the plaintiff had commenced an action to recover the amount of his bill, the defendant, on the 14th of February, 1828, obtained a Judge's order to tax the bill; on the 9th of June the bill was taxed, and upon such taxation, more than a sixth having been taken off, the defendant obtained a rule to refer it to the Master to allow him the costs of taxation.

*Parke*, in Trinity term, obtained a rule nisi to discharge that rule, upon the ground that a party was only entitled to the costs of taxation when a sixth of the bill was taken off upon taxation, made by virtue of the statute 2 G. 2, c. 23, s. 23, and that under that statute the application to tax the bill ought to have been made within a month after its delivery.

*Kelly*, in Trinity term last, showed cause, and contended that every taxation of an attorney's bill made before or after action brought, was within the meaning of the statute.

*Parke*, contra. Before the statute 2 G. 2, c. 23, s. 23, an attorney might have sued his client immediately after he had delivered his bill. The statute 2 G. 2, c. 23, s. 23, prevents an attorney from bringing any action to recover the amount of his bill until the expiration of a month after he shall have delivered it; and upon application of the party sought to be charged, and upon his submission to pay the sum that upon taxation shall appear to be due, the bill may be referred to taxation, although no action be depending, and if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation. The taxation, therefore, contemplated by the statute, is a taxation made upon the application of the client before action brought. If the case had been tried, and the bill had been reduced one-sixth by the verdict of a jury, the defendant would not have been entitled to any costs; or if a verdict had been taken, subject to a reference to the Master, and one-sixth had been taken off, the costs of taxation would not have been allowed. The same point came before the Court of C. P. in *Benton v. Bullard*, 4 Bingh. 561. The prothonotary in that case had refused to allow the costs of taxation, on the ground that the plaintiff had commenced his action on his bill before the defendant obtained any order to tax it, and said that he had uniformly pursued that course. The Court said, that that was the practice, and that the point had been determined repeatedly.

*Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. We are of opinion, on the authority of the case of *Benton v. Bullard*, that the defendant in this case was not entitled to the costs of taxation, although a sixth part of the bill had been taken off. The rule which has been obtained for discharging the rule for allowing these costs must, therefore, be made absolute.

Rule absolute.

## HANDLEY v. LEVY.—p. 637.

Where in an action commenced in the Palace Court, and afterwards removed into K. B., the plaintiff recovers less than the sum for which he held the defendant to bail, the Court of K. B. has no power to allow the defendant his costs under the statute 43 G. 3, c. 46, s. 8.

THIS action, which had been commenced in the Palace Court, was removed by the defendant into this Court. The defendant had been arrested and held to bail for 19*l*. The plaintiff recovered only 2*l*. A rule nisi had been obtained to tax the defendant his costs under the 43 G. 3, c. 46, s. 8.

*Thesiger* showed cause. The eighth section enacts, that where a defendant has been arrested for any sum, if it be made appear to the satisfaction of the court in which the action is brought that the plaintiff hath not reasonable or probable cause for arresting and holding the defendant to bail to such amount, the defendant shall be entitled to costs of suit. Here the action having been brought in the Palace Court, this Court has no jurisdiction, *Costello v. Corlett*, 4 Bingh, 474.

Lord TENTERDEN, C. J. The action having been brought in the Palace Court, we have no power by the statute to interfere. The rule must be discharged.

Rule discharged.

## TENON v. MARS. — p. 638. (a)

An affidavit of debt, stating that defendant was indebted to the plaintiff as liquidator (duly appointed by the law of France) of an estate, is irregular, unless it show that by the law of France a liquidator is entitled to sue.

In this case the plaintiff and defendant were subjects of the king of France. The affidavit of debt was by T. A. Tenon, liquidator (legally appointed by the law of France) of the estate of J. Vernarell and T. A. Tenon, lately carrying on business as booksellers at Paris under the firm Vernarell and Tenon, and stated that the defendant was indebted to T. A. Tenon as liquidator of that estate, by virtue of promissory notes drawn in France by the defendant. A rule nisi had been obtained by *Denman* for delivering up the bail-bond to be cancelled, on the ground that it did not appear by the affidavit of debt, that the plaintiff as liquidator, by the law of France, was entitled to sue.

The Court, after hearing *Manning* against the rule, were of opinion that it ought to have been shown that, by the law of France, a liquidator was entitled to sue, and made the rule absolute.

Rule absolute.

(a) The trial at bar of the cause of *Rowe v. Brenton* occupied the court from Wednesday the 19th of November, until a late hour in the evening of Wednesday the 26th of November.

## The KING v. The Justices of KENT. — p. 639.

Semble, That it is unnecessary to enter and respite an appeal at the next sessions where the order of removal is served so late as to render it impossible to try the appeal at those sessions.

AN order for the removal of a pauper from the parish of Lenham, in Kent, to the parish of Pluckley in the same county, was made on the 7th of April, and served on the 8th. The sessions were holden on the 15th of April, at Maidstone. By the practice of the sessions, eight clear days' notice of the intention to try an appeal is required. The appeal was not entered at the April sessions, but the parish officers of Pluckley gave eight clear days' notice of their intention to try the appeal at the July sessions. At the time when the order of removal was served, the parish officers of Pluckley said they should appeal; the parish officers of Lenham observed, that nothing could be done at the then next (April) sessions, as there would not be eight clear days before those sessions. The court of quarter sessions refused to hear the appeal, on the ground that it ought to have been entered and respited at the sessions which were holden on the 15th of April. A rule nisi having been granted for a mandamus to the justices of the county of Kent to enter continuances and hear the appeal,

*Bolland* now showed cause. The appellant ought to have entered and respited his appeal at the April sessions, *Rex v. The Justices of Herefordshire*, 3 T. R. 504.

LORD TENTERDEN, C. J. We think it reasonable, under the circumstances of this case, that the parish officers of Pluckley should have an opportunity of trying their appeal. They may probably have been misled by the observation made by the parish officers of Lenham, that they could do nothing at the then next (April) sessions, as there were not eight clear days before those sessions. Independently of that, it appears to me to have been wholly unnecessary to enter and adjourn the appeal at the first sessions, when they could not, according to the practice of those sessions, then try it.

Rule absolute.(a)

(a) The following case was decided in Hilary term, 1829.

The KING v. The Justices of DEVON.

An order of removal was served too late to enable the parish to which the pauper was removed to try an appeal at the next sessions; but it might have been entered and respited at those sessions: Held, that that was unnecessary, and that due notice of the intention to prosecute the appeal at the second sessions having been given, the court of quarter sessions were bound to hear and determine it.

An order of removal from the parish of Upottery to Pittminster was served on the 8th of April. The sessions were held at Exeter on Tuesday the 15th day of April. The distance between Pittminster and Upottery is eight miles, and between Pittminster and Exeter thirty miles. By the practice of the sessions eight clear days' notice of the intention of the appellant to try his appeal is required. But an appeal may be entered and respited without any notice. The appeal was not entered at the Easter sessions. But eight days' notice of the intention to try the appeal at the July sessions was given by the appellant parish. The court of quarter sessions refused to hear the appeal, on the ground that it ought to have been entered at the April sessions. A rule nisi for a mandamus to the justices of Devon to enter continuances and hear the appeal having been granted,

*Crowder* and *Præd* showed cause. According to the general rule an appeal against an order of removal must be made to the next sessions to which the party can by possibility appeal after the order of removal made. *Rex v. The Justices of the East Riding of Yorkshire*, Doug. 193. Here the parish officers might clearly have entered their appeal at those sessions, although, in consequence of the rule requiring eight clear days' notice of trial they could not have tried it. *Rex v. The Justices of Herefordshire*, 3 T. R. 504, and *Rex v. The Justices of the West Riding of Yorkshire*, 4 M. & S. 327, are authorities to show that they ought to have entered the appeal at those sessions, and adjourned it to the next.

*Coleridge* and *Estcourt*, contra. The rule for a mandamus must be made absolute, unless it be necessary to enter an appeal in all cases, although the order of removal is served so late as to render it impracticable to try the appeal at the sessions next after

the making of the order. The entering of the appeal at those sessions must, under such circumstances, be useless, and can only occasion unnecessary expense. In *Rez v. The Justices of Essex*, 1 B. & A. 210, the order of removal was served on the appellant parish on Saturday; the sessions were holden on the following Tuesday; the appellant parish was thirty-seven miles from the place where the sessions were holden. There was no appeal to those sessions, and the justices refused to receive the appeal at the second sessions. This Court granted a mandamus. It was urged against that application, that the appellant ought to have entered and respited the appeal; but Lord Ellenborough said, "That would only be incurring a useless expense without conferring any benefit on either party, and therefore quite unnecessary." *Rez v. The Justices of Southampton*, Trinity term, 57 G. 3, is also in point. *Cur. adv. vult.*

Lord TENTERDEN, C. J. This was a rule for a mandamus to the justices of Devon to enter continuances and hear an appeal. The order of removal was served on the 8th of April; the sessions were holden on the 15th at Exeter. By the practice of those sessions, eight clear days' notice of the intention to try an appeal was required. It is clear, therefore, that in this case the appellant could not have tried his appeal at the April sessions; but it was contended that he ought to have entered it at those sessions, and adjourned it to the next. The entry for the mere purpose of adjournment is an useless act, and only occasions unnecessary expense. I think, therefore, that he was not bound to enter it at those sessions. One inconvenience only can follow from our holding, that it is not necessary, under such circumstances, to enter the appeal at the first sessions, viz. where the removal is made within eight days of the sessions, so that the parish to which the pauper is removed cannot try their appeal at those sessions, the removing parish may not know of the intention of the other parish to appeal until eight days before the second sessions. If that should prove to be an inconvenience, the court of quarter sessions may remedy it by requiring, under such circumstances, a longer notice. We think that the court of quarter sessions ought to have heard the appeal, and that the rule for a mandamus must be made absolute.

Rule absolute.(a)

(a) The KING v. The Justices of SOUTHAMPTON.

The order, which was for the removal of a pauper from the parish of Ropley to the parish of Bentworth, was dated the 2d of January. It was signed by the magistrates at Arlesford, which place was distant from Ropley four miles, and from Bentworth eight, and Bentworth was distant from Ropley five miles. The order was not served until the 7th of January. The sessions were holden at Winchester on Monday the 14th of January. The distance between Winchester and Bentworth was fifteen miles. By the practice at the Hampshire sessions, notice of prosecuting appeals against orders of removal was required to be given by the appellants eight days, at least, before the sessions. The parish officers of Bentworth, therefore, could not try their appeal at the January sessions. They applied to the Court for leave to enter the appeal at an adjournment of those sessions holden on the 15th of March, but that was refused. Due notice of appeal was given for the April sessions, which were holden on the 15th of that month; but the justices of those sessions refused to hear the appeal, on the ground that it had not been entered at the preceding sessions. In Easter term, 57 G. 3, a rule nisi was granted for a mandamus, commanding the justices to enter continuances and hear the appeal, and it was made absolute in Trinity term.

MICHLAM v. BATE. — p. 642.

The defendant is not entitled to costs of a judgment of non pros. obtained by reason of the plaintiff having omitted to enter the issue on record, after issue joined on a demurrer to a plea in abatement.

Issue was joined in this case in Michaelmas term upon demurrer to a plea in abatement. The plaintiff omitted to enter the issue upon record. Judgment of non pros. was signed by the defendant for not entering the issue. The defendant's attorneys applied for costs of judgment of non pros., which the plaintiff refused to pay. The defendant then issued a ca. sa., and the plaintiff, in order to prevent an arrest, paid to the sheriff of Gloucester 10*l.* A rule nisi had been obtained to set aside the ca. sa. and all subsequent proceedings for irregularity, and to have restored the sum of 10*l.* paid to the sheriff.

*Follett* showed cause. According to the general rule, a defendant who obtains judgment of non pros. is entitled to costs, *Davis v. James*, 1 T. R. 371. An executor is even liable to costs on a judgment of non pros., *Hawes v. Saunders*, 3 Burr. 1584.

*Campbell*, contra. The defendant who obtains judgment of non pros. is entitled to costs under the statute 4 Jac. 1, c. 3, whereby it is enacted, that if any person shall commence any action in any court wherein the plaintiff or defendant might have costs, in case judgment shall be given for him, and the plaintiff after appearance be nonsuited, or a verdict pass against him, then the defendant shall have his costs. Now the defendant having pleaded in abatement, would not have been entitled to costs if judgment of the Court had been given for him after the argument; for the statute 8 & 9 W. 2, c. 3, which enacts, "that if any person shall commence an action wherein upon demurrer either by plaintiff or defendant judgment shall be given by the Court against the plaintiff, the defendant shall have judgment to recover his costs," has been held not to extend to demurrers on pleas in abatement, *Thomas v. Lloyd*, 1 Salk. 194, 1 Ld. Raym. 336, nor to any action where the defendant would not have been entitled to costs upon a nonsuit or verdict, *Thrale v. The Bishop of London*, 1 H. Bl. 530.

LORD TENTERDEN, C. J. If the plaintiff had entered the issue, and the judgment of the Court had been against him, he would not have been liable to pay costs. Here he forbore to enter the issue, and thereby rendered it unnecessary for the defendant to incur the expense of arguing the demurrer. As the plaintiff would not have been liable to pay the costs, if the Court, after argument, had given judgment against him, we think he ought not to be subject to costs by reason of his having omitted to enter the issue, and thereby rendered expense unnecessary. The rule must, therefore, be made absolute.

Rule absolute.

In the Matter of JAMES NUNN. — p. 644.

By stat. 6 G. 4, c. 108, s. 3, if any vessel therein described shall be found on the high seas, within 100 leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said distance, having on board the goods therein specified, the goods and the vessel shall be forfeited. By s. 49, every person who shall be found or discovered to have been on board any vessel liable to forfeiture under that act for being found or discovered to have been within any of the distances or places mentioned in the act from the United Kingdom, shall forfeit 100*l.*, and may be detained and taken before two justices, to be dealt with as thereafter mentioned. By s. 74, any offence against that act shall, for the purpose of prosecution, be taken to have been committed, and the penalties incurred, at the place on land in the United Kingdom into which the person committing such offence, or incurring such penalty, shall be taken, brought, or carried; and in case such place on land is situate within any city, &c., the justices of the peace for the city, &c., as well as those for the county within which such city is situate, shall have jurisdiction to try all offences committed upon the high seas against the act. A vessel liable to forfeiture under this act was seized in a part of the river Orwell, where the justices of Ipswich had jurisdiction, and a person found on board the vessel was taken to Harwich, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found on the high seas on board a vessel liable to forfeiture: Held, that the justices of Harwich, being justices at the first place on land to which the party was carried, had jurisdiction to try the offence.

When the vessel was first boarded she was just entering the harbor of Harwich: Held, that, in the absence of all other evidence, a person then found on board might properly be found to have been on board on the high seas.

PLATT on a former day in this term obtained a rule to show cause why a writ of habeas corpus should not issue, directed to the gaoler or keeper of the convict gaol at Springfield, in the county of Essex, or his deputy, commanding him to bring up the body of James Nunn. It appeared by the affidavits in support of the rule, that Nunn had been convicted before two justices of the borough of Harwich, in the county of Essex, upon the information of E. J. Jennings, an officer of customs, of having within six months then last past, to wit, on the 18th of September, 1828, he Nunn being a subject of his Majesty, and liable to be stopped, arrested and detained for the offence thereafter mentioned, *been found on the high seas on board a certain vessel liable to forfeiture*, under the provisions of stat. 6 G. 4, c. 108; for that the said vessel not being square-rigged, and belonging to his Majesty's subjects, on the day and year aforesaid, was found on the high seas aforesaid, elsewhere than in any part of the British or Irish Channel, within 100 leagues of a certain part of the coast of the county of Essex, having on board divers, to wit, 4,800 pounds weight of tobacco, &c., contrary to the form of the statute in that case made and provided; and the said James Nunn having been found on board the said vessel at the time of her becoming and being so subject and liable to forfeiture; and the said James Nunn having been on the day and year last aforesaid, for the offence aforesaid, stopped, arrested, and detained by W. P., he W. P. being an officer of customs, and by him taken and brought into a certain place on land in the United Kingdom, to wit, into the borough of Harwich, in the county of Essex, the said justices had adjudged that the said James Nunn had forfeited for his said offence 100*l.*; that sum not having been paid, the justices required W. P. and W. B. to take and convey Nunn to the said convict gaol at Springfield, in the county of Essex, and to deliver him into the custody of the gaoler of that gaol, and required the said gaoler to take Nunn into his custody, and safely keep him until he should pay the said 100*l.* The affidavits then stated, that Nunn at the time when he was arrested and detained, as in the commitment was mentioned, was not found upon the high seas as charged in the commitment, but was then on board a certain vessel called the *Mary and Eliza*, being the vessel referred to in the commitment, which vessel was then proceeding on her voyage, and sailing upon that part of the coast of Suffolk which lies next the bounds of the parish of Walton, in the county of Suffolk, but not at a greater distance than 300 yards from the land on the said coast, and in the river Orwell, commonly called the Ipswich Water; and the place where he was so stopped, arrested, and detained was opposite to the south-east side of the town of Harwich, in the county of Essex, where the river is about a mile wide; and that the said town of Harwich and part of the coast of Essex may be very distinctly seen from the said place, and also that part of the coast of Suffolk which is nearest to the said place; and that the civil and criminal jurisdiction of the borough of Ipswich extended from the town of Ipswich down the said river, below Landguard Fort; and that persons were tried at the sessions for the borough of Ipswich, for offences committed upon the said river, at least seven miles distant from the parochial limits of the said borough; and that the jurisdiction of the justices of the borough of Ipswich over the place thereinbefore mentioned was public and notorious; and that the whole of the river Orwell, which flows from Landguard Fort, is within the jurisdiction of the borough of Ipswich. It appeared by the depositions taken before the magistrates (which had been returned to this Court under a certiorari), that W. P., a custom-house officer, being

on watch about a quarter past four in the morning of the 18th of September, 1828, saw the vessel mentioned in the conviction entering the harbour of Harwich, about two miles from the town of Harwich; that he boarded her, and found Nunn on board her. The rule was obtained on the ground that the magistrates of Harwich had no jurisdiction to try the offence; first, because there was no evidence to show that Nunn was on board the vessel on the high seas; and, secondly, assuming that that fact was made out, the magistrates of Ipswich or of the county of Suffolk had jurisdiction, and not the magistrates of the borough of Harwich.

*The Solicitor-General* and *Shepherd* now showed cause. The information alleges that Nunn had been found on the high seas on board a vessel liable to forfeiture, and that the justices convicted him of the offence charged in the information. They have, therefore, adjudged that he was found on board the vessel on the high seas, and their judgment is equally conclusive as to that fact, as it is as to the fact that a quantity of tobacco was on board that vessel. But assuming that to be otherwise, it appears by the depositions that the custom-house officer, at a quarter past four in the morning, discovered a vessel coming into the harbour, and that when she had come into the harbour, he made for her, boarded her, and then found Nunn on board her. At the time when the vessel was first seen she was on the high seas. It is wholly immaterial where she was when she was seized. It is sufficient that she was found on the high seas. Then, as to the second point, it is clear that the justices of the borough of Harwich, by the 6 G. 4, c. 108, s. 74, had jurisdiction to try the offence; for that was the first place on land into which she was carried.

*Platt, contra.* Nunn, the prisoner, was taken and carried to a place which was within the local jurisdiction of the magistrates, either of the borough of Ipswich or of the county of Suffolk; and *Kite and Lane's case*, 1 B. & C. 101, shows that having been taken within one jurisdiction, he ought not to have been removed to another. Secondly, by the statute 6 G. 4, c. 108, ss. 3, 49, and 74, (a) it is essential, in order to give the magis-

(a) By the statute 6 G. 4, c. 108, s. 3, it is enacted, that if any vessel or boat not being square rigged, belonging in the whole or in part to his Majesty's subjects, shall be found in any part of the British or Irish Channels, or elsewhere on the high seas, within one hundred leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board, inter alia, tobacco, &c.; then and in such case the said tobacco, and also the vessel or boat, with all guns, &c., therein, shall be forfeited.

By s. 49, it is enacted, that every person, being a subject of his Majesty, who shall be found or discovered to have been on board any vessel or boat liable to forfeiture under that or any other act relating to the revenue of customs, for being found within four or eight leagues of the coast of the United Kingdom as aforesaid, or for being found or discovered to have been within any of the distances or places in that act mentioned, from or in the United Kingdom, or from or in the Isle of Man, having on board, or having had on board, or conveying or having conveyed in any manner such goods or other things as subject such vessel or boat to forfeiture, shall forfeit the sum of 100*l.*; and it shall be lawful for any officer of the army, navy, or marines, being duly authorized, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, to stop, arrest, and detain every such person, and to carry and convey such person before two or more justices of the peace in the United Kingdom, &c., to be dealt with as thereafter directed. Provided always, that any such person proving to the satisfaction of such justices that he was only a passenger in such vessel or boat, and had no interest whatever in the vessel or boat, or in the cargo on board the same, shall be forthwith discharged by such justices.

By s. 74, it is further enacted, that in case any offence shall be committed upon the high seas against that or any other act relating to the revenue of customs, or any penalty or forfeiture shall be incurred upon the high seas for any breach of such act, such offence shall, for the purpose of prosecution, be deemed and taken to have been com-

trates jurisdiction, that the offence should have been committed on the high seas. The justices of Harwich, therefore, had no jurisdiction to convict Nunn, unless they had some evidence to show that he was on board the vessel on the high seas. There was no evidence to show that he had committed any offence upon the high seas. The only evidence was, that he was on board the vessel at the time when, and the place where, she was seized; but that was a place within the jurisdiction of the magistrates of the borough of Ipswich. It is consistent with the facts sworn to before the magistrates, that Nunn may have come on board the vessel after she had left the high seas. There was no evidence to show that he was in her but in the place where he was found. The magistrates, in the conviction, assume that he was upon the high seas. They had no right to assume that fact, when there was no proof of it.

Lord TENTERDEN, C. J. The objection taken to the conviction is twofold; that the prisoner was not found on board a vessel on the high seas; and that his offence, if any, was committed within the jurisdiction of the justices of Suffolk or Ipswich, and not those of Harwich. It has been said, that supposing the vessel to have been on the high seas, this man might have come on board her after she had left the high seas. If that were the fact, it was matter of defence to the information, because in that case the allegation of the prisoner having been found on the high seas would not have been made out in proof. We cannot, therefore, assume that to have been the fact. It is said, however, that if in truth it shall appear that the offence was not committed on the high seas, but within the body of a county, although that would have been a defence to the information, yet, as the fact of his being on the high seas is that which gives jurisdiction to the magistrates, we ought to enquire into it, notwithstanding the averment in the information that he was found upon the high seas. I have great doubts whether that doctrine can be maintained. I do not think it necessary, however, to give a decided opinion upon it, because the whole matter is now before us, and it is made plain to my mind, that the offence of this person was committed on the high seas. It appears from the depositions taken before the magistrates, that the officer, being upon the watch at about a quarter past four in the morning, discovered this vessel coming into the harbour: that must mean coming from the sea, and, there-

mitted, and such penalties and forfeitures to have been incurred, at the place on land in the United Kingdom or the Isle of Man into which the person committing such offence, or incurring such penalty or forfeiture, shall be taken, brought, or carried; and in case such place on land is situated within any city, borough, &c., as well any justice of the peace for such city, borough, &c., as any justice of the peace for the county within which such city, &c. is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding. Provided always, that all offences against that or any other act relating to the revenue of customs committed in any city, borough, &c. shall be deemed and taken to have been committed in the county within which such city, &c. is situated, and as well any justices of the said city, &c., as any justices of any county in which such city, &c., is situated, shall have jurisdiction to hear and determine the same.

By s. 80, it is enacted, that it shall be lawful for any two or more justices of the peace before whom any person liable to be arrested and detained, and who shall have been arrested and detained for being found or discovered to have been on board any vessel or boat liable to forfeiture under that or any act relating to the revenue of customs, &c. shall be carried, on the confession of such person of such offence, or on proof thereof upon the oaths of one or more credible witnesses, to convict such person; and every such person so convicted shall immediately pay into the hands of such justices the penalty of 100*l.*, or in default thereof the said justices shall commit such persons to any gaol or prison, there to remain until such penalty be paid.



fore, the vessel must have been upon the sea; and if the man was in the vessel upon the sea, he was guilty of the offence charged in the information. As to the other point, the seventy-fourth section enacts, "that if any offence shall be committed upon the high seas, such offence shall, for the purposes of prosecution, be deemed and taken to have been committed at the place on land in the United Kingdom, into which the person committing such offence shall be taken, brought, or carried." Now this person was taken, brought, and carried into Harwich. If, therefore, the offence was committed upon the high seas, which, for the reasons already given, I think it clearly was, if he was first taken into Harwich, the magistrates of that place had jurisdiction to try him, and the objection which has been taken, as to the want of jurisdiction in the convicting magistrates, falls to the ground. *Kite and Lane's case* is entirely different from the present. The information in that case alleged, that the party had been found on board a boat in the harbour of Folkestone, not that he had been found upon the high seas, or that any offence had been committed there.

BAYLEY, J. By the third section of the 6 G. 4, c. 108, any ship discovered to have been at sea with tobacco on board, under the circumstances therein mentioned, is liable to forfeiture; and by section 80, "any person found on board such ship is liable to be convicted." But it is contended that this person was not found to have been on board this ship on the high seas, but that he was upon the water within the limits of the county of Suffolk, or the borough of Ipswich; and then it is said, that the seventy-fourth section is to be read as if the magistrates of the place in which the party is arrested and taken only had jurisdiction; but the words of that section give authority to those magistrates within whose jurisdiction the party shall be *taken, brought, or carried*. Therefore, if he was taken upon the water within the limits of a particular county, and was carried in the vessel to any other place not within the limits of that county, the magistrates of that place to which he was so carried had jurisdiction over the subject. In *Kite and Lane's case* the party was first carried to Folkestone, and afterwards taken from Folkestone to Dover.

LITLEDALE, J. In order to constitute an offence within this act of parliament two things must concur. First, the vessel must have been on the high seas, and next the party must have been on board the vessel on the high seas. Now in this case both these things concur. First, it appears by reasonable evidence that the vessel was found within the limits mentioned in the act of parliament, having tobacco on board, and that Nunn was on board the vessel while she was in that situation. It is said he might have been taken on board when the vessel was off shore. If that fact had appeared before the magistrates, he could not have been convicted. No proof of that kind having been given, I think there was reasonable evidence for the justices to find that he had been on board the vessel while she was on the high seas. Then as these two things concur, the next question is, who are the magistrates that had jurisdiction over this offence? It seems to me that the magistrates of the place into which the person who commits the offence shall be carried have jurisdiction to try it. The vessel in going up a river may pass through several jurisdictions; but the justices of the place on land into which the man is first taken, have jurisdiction to try him. That place, in this case, was Harwich.

PARKE, J. I also think that the magistrates of Harwich had jurisdiction. The question turns on the construction of the seventy-fourth

section. In order to give the magistrates jurisdiction, two things are necessary. First, that the offence shall have been committed on the high seas; and, secondly, that the convicting magistrates shall be magistrates of the place on land to which the person who has committed the offence is carried. First, there was abundant evidence for the magistrates to find, that the defendant was on board the vessel on the high seas. Secondly, though it may happen that in the course of taking the vessel from the place where the man was arrested (and the place where he was arrested is immaterial) he may have passed over a portion of land covered with water, which was within another jurisdiction, there is no doubt that Harwich was the first place on land to which he was taken, and that the magistrates who committed him were magistrates having jurisdiction at that place. That being so, they had jurisdiction over the offence. This rule must, therefore, be discharged.

Rule discharged.

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PITT v. NEW.—p. 654.

An affidavit of debt for money paid for the use and benefit of the defendant is irregular, if it omit to state that it was paid at his request.

A RULE nisi had been obtained for discharging the defendant out of the custody of the sheriff of Gloucester upon filing common bail, upon the ground that the affidavit of debt was defective. It stated that John New was indebted to deponent Pitt in the sum of 6,400*l.* for money paid, laid out, and expended by deponent to and for the use and benefit of John New; but it did not allege it to have been paid at the request of New.

*Campbell* now showed cause. In *Dumford v. Messiter*, 5 M. & S. 446, it was undoubtedly decided, that an affidavit of debt for money lent, and for goods sold and delivered, and for work and labour, is irregular, if it omit to state "at the instance and request of defendant," although it state that it was "to and for his use and on his behalf;" but in *Bliss v. Atkins*, 5 Taunt. 756, *Eyre v. Hulton*, 5 Taunt. 704, and *Berry v. Fernandes*, Bing. 388, the Court of Common Pleas held, that an affidavit of debt for money paid for a defendant and advanced to him, need not state "that the payment and advance were at the defendant's request."

Lord TENTERDEN, C. J. I have a very great respect for the opinion of the Court of Common Pleas; but we are bound to exercise our own judgment on every case submitted to our consideration. The fact of one man's having paid money to the use of another, does not (unless it has been paid at the request of that other) give him any cause of action against that other, because a man cannot, of his own will, pay another man's debt, and thereby convert himself into a creditor. It is perfectly consistent, therefore, with the facts stated in the affidavit, that the plaintiff may not be entitled to recover. The affidavit, consequently, is insufficient, and this rule must be made absolute.

Rule absolute.

The KING v. The Inhabitants of LEW.—p. 655.(a)

An assistant overseer, elected and appointed under the statute 59 G. 3, c. 12, at an annual salary of 10*l.*, will gain a settlement by serving such office for a year. But the appointment in writing, under the hands and seals of the justices, to such an office, with an annual salary annexed to it, requires a stamp of 2*l.*

UPON appeal against an order of two justices, whereby W. Purbrick, his wife and children, were removed from the township of Charlbury, in the county of Oxford, to the hamlet of Lew in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

W. Purbrick, the pauper, being settled in the hamlet of Lew, was, on the 16th day of October, 1826, duly elected by the inhabitants of the township of Charlbury, in vestry assembled, to be an assistant overseer of the poor of the said township, in pursuance of the statute 59 G. 3, c. 12, s. 7. The vestry determined that the pauper should perform the duties and receive the salary mentioned in the warrant of appointment hereinafter set forth. On the 18th of the same month he was appointed such assistant overseer by the following warrant under the hands and seals of two justices: "The township of Charlbury in the county of Oxford, to wit. Whereas the inhabitants of the township of Charlbury, in the county of Oxford, in vestry assembled in the said township on the 17th day of October, 1826, did nominate and elect W. Purbrick, of the township aforesaid, to be an assistant overseer of the poor of the said township, and did fix the yearly sum of 10*l.* as and for the yearly salary of the said W. Purbrick, for the execution of his said office. Now we, two of his Majesty's justices of the peace in and for the said township, and in pursuance of the statute in such case made and provided, do hereby appoint the said W. Purbrick to be an assistant overseer of the poor of the said township, and we do hereby authorise and empower him to execute and perform the said duties, and to receive the said salary so as aforesaid fixed by the said inhabitants in their said vestry." This warrant of appointment was not stamped. The pauper duly performed the duties of assistant overseer by virtue of the aforesaid appointment, for one whole year from the date thereof, and resided during that time in the township of Charlbury. The sessions were of opinion that the warrant of appointment under the hands and seals of two justices did not require any stamp, and they therefore received it in evidence; but they decided that no settlement was gained, subject to the opinion of the Court, first, whether the situation of assistant overseer, described in the warrant of appointment, was an office the serving of which for a year would confer a settlement; and, secondly, if the Court should be of opinion that it was such an office, whether the warrant of appointment, being in writing, required a stamp.

*Cooper* in support of the order of sessions. The statute 3 & 4 W. & M. c. 11, s. 6, enacts, "That any person who shall for himself, or on his own account, execute any public annual office or charge during one whole year, shall gain a settlement." An assistant overseer does not execute a public annual office or charge within the meaning of that statute.

(a) The Judges of this Court sat, as on former occasions, from Monday the 8th day of December, to Saturday the 20th day of December inclusive; and from Tuesday the 13th day of January to Thursday the 22d day of January inclusive. During that period this and the following cases were argued and determined.

First, strictly speaking, he does not execute any office at all. An office must be derived mediately or immediately from the crown, or be created by act of parliament. The statute 59 G. 3, c. 12, s. 7, only enables the inhabitants to elect an assistant overseer if they think fit. The party so elected does not derive his employment from the act of parliament, but from the parishioners. [*Parke, J.* It is called an office in the statute 59 G. 3, c. 12, s. 7.] Secondly, it is not an annual office, for the appointment may be revoked at any time within the year. Thirdly, the statute 3 & 4 W. & M. c. 11, s. 6, contemplates then existing, and not subsequently created offices. Fourthly, the office must be executed for himself, and on his own account. Here he was a mere deputy of the overseer. In *Bennett v. Edwards*, 7 B. & C. 586, *Holroyd, J.*, says, "He may be appointed generally to do all the duties as a deputy." Secondly, the appointment is bad, because it does not specify the duties to be performed, as required by the 59 G. 3, c. 12, s. 7. It is also bad for want of a stamp. By the statute 55 G. 3, c. 184, sched. tit. Grant, any grant or appointment by his Majesty, his heirs or successors, or by any other person or persons, of or to any office or employment by letters patent, deed, or other writing, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l.* per annum, requires a stamp of 2*l.* Here the appointment was made by the magistrates in writing, and the emolument was less than 50*l.* per annum, it therefore required a stamp.

*Taunton and Chilton*, contra, [were desired by the Court to confine their argument to the question whether the appointment required a stamp.] The statute 55 G. 3, c. 184, sched. tit. Grant, was evidently intended to apply to patent and corporate offices and others ejusdem generis, and not to parochial offices. At the time when that statute passed, the office of assistant overseer did not exist. Besides, it is derived from the parishioners, though the appointment is required to be sanctioned by two magistrates, and therefore is not an appointment within the meaning of the act of parliament.

BAYLEY, J. I have no doubt that the pauper held a public office or charge within the meaning of the statute 3 & 4 W. & M. c. 11, and that he executed that office for himself and on his own account. It was a public office in the parish; the duties were executed throughout the parish. He was appointed to it by the inhabitants of the parish in vestry assembled. I think also that it was an annual office. The pauper was to receive a yearly salary for executing the duties of it; and although he might be removed within the year, he would continue in the office for a year, unless something was done to determine it within that period. He had an estate for a year in his office, defeasible on a particular event; as in the case of a lease for a year, determinable by notice within the year. In that case the lessee is in of the estate for the year, though it may be determined by notice, *Rex v. Herstmonceaux*, 6 B. & C. 550. The office held by the pauper was held by him in his own right, and not as the deputy of the principal overseer. The office of assistant overseer is separate and distinct from that of principal overseer. The great difficulty in this case arises from the want of a stamp. The statute 55 G. 3, c. 184, sched. tit. Grant, requires that any grant or appointment made by any person or persons of or to any office or employment, by writing, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l.* per annum shall have a stamp of 2*l.* If I were at liberty to conjecture, I should say that the legislature did not contemplate an

appointment of this description; but I am bound to give effect to the words used in this act of parliament. The statute 59 G. 3, c. 12, s. 7, authorises the inhabitants of any parish in vestry assembled to nominate and elect any discreet person to be assistant overseer of the poor, and to determine and specify the duties to be by him executed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and then it authorises any two justices by warrant to appoint any person so elected, and declares that every person so appointed shall continue to be an assistant overseer until he shall resign such office, or until his appointment shall be revoked. The assistant overseer is required to be appointed by two justices by their warrant in writing. Here the pauper was appointed by a warrant in writing. It is an appointment in writing to an office or employment where the yearly salary does not amount to 50*l*. It, therefore, is within the very words of the act, and required a stamp.

LITTLEDALE, J. I think this appointment required a stamp. I cannot get over the words of the act of parliament. There are general exemptions at the end of that part of the schedule of the stamp act which relates to appointments to offices, but this is not within them. I have no doubt on the other point. This is called an office in the act of parliament. It is from the nature of the thing an office. If an overseer be an officer, an assistant overseer is equally so. It is also an annual office; for there is an annual salary. And although he may be removed within the year, still he is appointed to the office for the year.

PARKER, J., concurred.

Order of sessions confirmed.

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The KING v. The Inhabitants of CHRIST CHURCH,  
LONDON.—p. 660.

A party does not gain any settlement by reason of his having been assessed to and paid the watch-rate in the city of London.

UPON an appeal against an order of two justices, whereby Sophia Gyles, wife of John Gyles, who was absent from her, and their two children, were removed from the parish of St. Anne, Blackfriars, in the city of London, to the parish of Christ Church in the same city, the sessions confirmed the order, subject to the opinion of this Court, on the following case:

John Gyles, the pauper's husband, occupied part of a house in Warwick lane, in the parish of Christ Church, of the yearly value of 20*l*., for several months in the year 1821, and, during that time, he was rated to, and paid two quarters' watch-rates for the ward of Farrington Within, in which ward the said house is situated. The city of London is divided into twenty-six wards, and the wards into precincts. The ward of Farrington Within contains seventeen precincts, and the house, in respect of which the watch-rates were paid J. Gyles, is, with regard to ward matters, in Saint Ewin's, and not in Christ Church precinct. The watch-rate is made by the alderman and common councilmen of each ward, under the authority of the statute 10 G. 2, c. 22, s. 2, which enacts, "for the better raising and levying of moneys for paying the wages of the watchmen and beadles, and other charges incident thereto; that the mayor, aldermen, and commons of the said city of London, in common council assembled,

every year, shall then and there determine and direct what sum and sums of money shall be raised and levied upon each respective ward for answering the purposes aforesaid; and for raising the said several sums of money, direct the alderman, deputy and common councilmen of each and every of the respective wards in the said city of London, and liberties thereof, to make an equal rate and assessment upon all and every the person and persons who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards (regard being had, in making the said rates, to the abilities of, and likewise to the rent paid by the said several inhabitants and occupiers so to be rated and assessed;) and the alderman, deputy, and common councilmen of each ward of the said city are hereby authorised and required to make such rate and assessment for their respective wards, in such manner and form as shall be so directed by the said court of common council, which said rates or assessments shall be collected quarterly from the several inhabitants or occupiers in each of the said several wards, by the several constables for the time being of the several precincts, or by the beadles in each of the said respective wards, as the alderman, deputy, and common councilmen of each ward shall direct and appoint; and in case of non-payment, the lord mayor, or the alderman of the ward wherein the premises are situate, may grant a warrant to the collector to levy the same." The form of the watch-rates in question (varying the time for which each was respectively made), is as follows: "London.—A rate and assessment made upon the several persons who inhabit, hold, occupy, and enjoy any land, house, warehouse, or other tenement within the ward of Farringdon Within (the precincts of Blackfriars and Monkwell excepted), for raising money to pay the watchmen and beadles appointed for the said ward, and other charges incident thereto (except the watchmen of the aforesaid precincts), for one quarter of a year, from the 25th of March to the 24th of June, 1821, pursuant to an act of common council of the year 1820. St. Ewins, Warwick Lane, John Giles (3)." The question for the opinion of this Court was, Whether such rate was one of the public taxes or levies within the statute of the 3 W. 3, c. 11, or any subsequent act; the being charged with, and paying towards which confers a settlement on the party so charged and paying.

*Adolphus* in support of the order of sessions. The pauper gained a settlement by payment of the watch-rate, by virtue of the statute 3 W. 3, c. 11, s. 6. The watch-rate undoubtedly is not a parochial rate; but *Rex v. Bramley*, Burr. S. C. 75, shows, that payment of a tax, which is not a parochial tax, confers a settlement. There the pauper was held to have gained a settlement by the payment of land-tax.

*Bolland*, contra, was stopped by the Court.

BAYLEY, J. The land-tax was holden to be within the act from the notice of inhabitancy that arises by the party's having been assessed, and paid it. Payment towards a county bridge gives no settlement, because the person pays as an inhabitant of the county, and not of the parish.(a) This watch-rate is not a parochial tax, nor is it collected by any officer belonging to the parish. The parish had not notice that the party who paid the watch-rate was an inhabitant of the parish. No settlement, therefore, was gained, and the order of sessions must be quashed.

Order of sessions quashed.

(a) 2 Nol. P. L. 123, citing Cases of Sett. 1.

The KING v. The Inhabitants of the Parish of ST. ANDREW the GREAT, in the Town and County of CAMBRIDGE.—p. 664.

Where it was made a question of fact at the sessions, whether there was a hiring and service for a year in the appellant parish, and the sessions confirmed the order of removal, subject to the opinion of this Court as to a settlement being gained there by hiring and service: Held, that this amounted to a finding by the justices at sessions that there was a hiring and service for a year in that parish, and that such finding ought not to be disturbed by this Court, if there were any premises to warrant it.

UPON appeal against an order of two justices, whereby Mary Ann Farrant, single woman, was removed from the parish of Ely, St. Mary, in the Isle of Ely, to the parish of St. Andrew the Great, in the town and county of Cambridge, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

It was proved that the pauper was hired to a Mrs. Furbank as nursery-maid, in the parish of St. Andrew the Great, in Cambridge, and lived there for five months; that she then went to Miss Henley, a straw-bonnet maker in the same parish, and asked her if she could give her work in her business, which she said she would for a fortnight or three weeks; that she did give her work for that time, two shillings a week, and her board, and that during this period the pauper lodged at her uncle's in another parish; that after that she went into Miss Henley's house, being told by Miss Henley that she might sleep there, and, further, that when she wanted clothes, she, Miss Henley, would find them for her. She had her board, but no wages. That after her thus coming to the house to sleep, Miss Henley told her she might provide a place for herself elsewhere when she could, and that she repeated this two or three times during her stay; that soon after this she went to visit her mother who was ill in Ely, leaving some of her clothes behind her; that she asked Miss Henley's leave to go, who gave her some pocket-money; that she stayed with her mother three weeks, and returned without any order from Miss Henley; that she went a second time to see her mother, had leave for one week, but stayed three, and, finally, left Miss Henley three weeks after her return. She stayed altogether about fifteen months, did the household work, and after having done that, she went to the straw-bonnet work. During the time the pauper remained in the house, Miss Henley had no other servant. If the Court of King's Bench shall be of opinion that a settlement by hiring and service was gained in the parish of St. Andrew the Great under the above circumstances, the order of sessions is to be confirmed. If the Court of King's Bench shall be of a contrary opinion, then both orders are to be quashed.

*Biggs Andrews*, in support of the order of sessions. The question raised by the evidence in this case was, Whether there was a contract of hiring for a year? That was entirely a question of fact, and the decision of it belonged to the justices at sessions. They, by confirming the order of removal, have decided that there was a contract for a year, and there was sufficient evidence to warrant them in coming to that conclusion. It is clear that a general indefinite hiring is a hiring for a year, unless there be something to raise a presumption to the contrary, *Rex v. Stockbridge*, Burr. S. C. 759; and if a person be hired for less than a year, and serve for three years, a contract for a year may be inferred. In the case of *Rex v. Christ's Parish, York*, 3 B. & C. 469, and in *Rex v. Trowbridge*, are cited, the paupers were hired so long only as they chose to stop,

and the same observation applies to *The King v. Great Bowden*, 7 B. & C. 249.

*Flanagan and Kelly*, contra. A contract for a year's service ought not to have been inferred by the sessions from the facts stated. Undoubtedly, if a general hiring only had been stated, that would have been a hiring for a year. But all the facts stated must be taken together. Here it appears that the pauper was hired in the first instance for a fortnight or three weeks, and that during that time she lodged at her uncle's in another parish; that she then went into Miss Henley's house, who told her that she might sleep there, and that when she wanted clothes she would find them for her; and that very shortly after coming into the house to sleep, Miss Henley told her she might provide another place for herself elsewhere. The fair inference from these facts is, that the weekly hiring originally bargained for continued, and that the pauper being afterwards lodged in her mistress's house, was to receive clothes instead of wages.

BAYLEY, J. It was a question of fact for the sessions to decide whether there was a contract of hiring for a year in the parish of St. Andrew. They have decided that there was such a contract for a year; and if there be any premises to warrant their decision, we ought not to disturb it. Now in this case the original contract between the pauper and her mistress was not for a year, but for a fortnight or three weeks. During the period which she served under that contract she lodged at her uncle's house, and received weekly wages. After that she was told by Miss Henley that she might sleep in her house, and that when she wanted clothes, she, Miss Henley, would find them for her. From this it may therefore be inferred, that both parties at that time contemplated that there should be a continuation of the service beyond the period required by a weekly hiring, until at least the pauper had earned the value of her clothes. The justices may have thought that that was an indefinite hiring, and if so, that it was a hiring for a year. It is true that Miss Henley afterwards told her that she might provide a place for herself elsewhere when she could. But if there was once a contract for a year, that could not be varied without the consent of both parties. Afterwards, from time to time, she had leave to go home, but there was no dissolution of the contract. Upon the ground, therefore, that if there be premises to warrant the sessions in the conclusion to which they have come, it is not for this Court to say that they have come to a wrong conclusion upon a question of fact, we think that their decision in this case ought not to be disturbed.

LITTLEDALE, J. It was for the justices at sessions to decide the question, whether there was a contract of hiring for a year. There were premises from which they might draw the conclusion that there was such a contract. From the same premises I, perhaps, should have drawn a different conclusion; but the justices having decided the fact, I am of opinion we ought not to disturb their decision.

PARKE, J. It is not necessary to say what my decision would have been upon the evidence stated in this case. The question whether there was a contract of hiring for a year, was entirely a question of fact which it was for the justices at sessions to decide. They have decided it. There were premises to warrant the conclusion to which they have come, and their decision ought not to be disturbed.

Order of sessions confirmed.(a)

(a) See the three following cases.



The KING v. The Inhabitants of ROSLISTON in the County of  
DERBY.—p. 668.

Where the court of quarter sessions have found, upon a case stated, that there was no general hiring, this Court will not disturb their decision, if there appear to have been any premises to warrant it.

UPON appeal against an order of two justices, whereby R. Taylor, his wife, and one infant daughter not then christened, were removed from the parish of St. Michael, in the city and county of the city of Lichfield, to the parish of Rosliston, in the county of Derby, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Richard Taylor, the pauper, on the 6th of February, 1827, and when about thirteen or fourteen years of age, went, with his mother, to J. Slater, a victualler and farmer, living in Sandford street, in the parish of St. Chad, otherwise Stowe, within the city and county of the city of Lichfield. The pauper's mother asked Slater if he wanted a boy; he said, Yes. She then asked what wages he would give? He (Slater) said, let him (pauper) stop what time he would, he would give him satisfaction, if not in money, in clothes. The pauper went into the service a few days afterwards; he looked after the horses, cows, and sheep, and attended to the general business of the farm. Slater gave the pauper his board, some clothing, and also some money at different times, and the pauper continued in such service in St. Chad's parish for thirteen months, and then ran away, because Slater beat him. Slater never sent after the pauper, nor did the pauper ever offer to return to Slater's service; but a few days after he had run away, he went to Slater's for his hat, which Slater refused to give him. The pauper, on his cross-examination by the respondent's counsel, stated, that at the time of hiring Slater did not say that he (the pauper) might go away when he pleased, or that Slater might turn him away when he pleased. The court of quarter sessions were of opinion that there was no general hiring in the parish of St. Chad, otherwise Stowe.

*Shutt* in support of the order of sessions. It was a question of fact for the justices at sessions to decide, whether or not there was a contract of hiring for a year. They have found that there was no general hiring, and there were premises to warrant them in coming to that conclusion.

*Whately*, contra. There was a general hiring in this case, no particular period having been mentioned for the continuance of the service. Here the master told the pauper's mother, that, let him stop what time he would, he, the master, would give him satisfaction, if not in money, in clothes. He used an expression, therefore, which referred to an indefinite service. That, consequently, was a general hiring. He cited *Rex v. Wincaunton*, Burr. S. C. 299, 1 Nol. P. L. 367, *Rex v. Christ's Parish, York*, 3 B. & C. 459, *Rex v. Trowbridge*, cited in *Rex v. Christ's Parish, York*, and *Rex v. Great Bowden*, 7 B. & C. 249.

BAYLEY, J. I think, in this case, that there were premises to warrant the sessions in finding that there was no general hiring, and under those circumstances, we are not at liberty to say that they have come to a wrong conclusion. Our decision in this case is consistent with all the cases which have been cited. In *Rex v. Trowbridge*, (a) it was held that a hiring for so long time as the pauper pleased was a hiring at will, and excluded any

(a) Cited in *Rex v. Christ's Parish, York*, 3 B. & C. 459.

presumption of a yearly hiring. *Rex v. Great Bowden* is an authority to the same effect. That case established, that where it is part of the contract that the master or servant may determine the service when they please, there is not any general or yearly hiring, and that no settlement can be gained under it. Considering this principle established by these two cases, we must see whether there were any premises to warrant the sessions in coming to the conclusion that there was no general hiring in this case. It appears, that when the pauper's mother asked what wages her son was to receive, the master said, "Let him stop what time he will, I will give him satisfaction in money or clothes." The sessions may have thought from this expression, that the pauper was at liberty to go whenever he pleased. The question is not, what conclusion I should have drawn from the same premises, but whether there were any premises to warrant the justices in coming to that conclusion. I think there were premises to warrant them in coming to that conclusion; and consequently we ought not to disturb their decision.

LITLEDALE, J. I think there was sufficient premises to warrant the justices in deciding that there was no general hiring in this case. I probably should have drawn a different conclusion from the facts stated, but it was a question of fact to be decided by the sessions, and their decision ought not to be disturbed.

PARKE, J., concurred.

Order of sessions confirmed.

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The KING v. The Inhabitants of EDWINSTOWE.—p. 671.

Relief given to a pauper while he is residing out of the relieving parish, is *prima facie* evidence of a settlement in that parish; and evidence of one instance in which relief was so given was held to be sufficient to warrant a finding by the sessions that the pauper was settled in the relieving parish, although upon a second application relief had been refused.

UPON an appeal against an order of two justices, whereby Sarah Dewick and her two children were removed from the parish of Mansfield, in the county of Nottingham, to the parish of Edwinstowe, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, at that time resident in Mansfield, applied for relief to Mr. Bullivant, the overseer of the appellant parish, at a public house in Mansfield, a distance of seven miles from Edwinstowe, on a market day; he gave her three shillings as relief, and said if she wanted further relief she must apply to him again at Edwinstowe, and he would give it her. A fortnight after the pauper went for relief to Edwinstowe, when she saw Mr. Bullivant and Mr. Sykes, the other overseer. They then refused to give her relief, saying, she must throw herself upon the parish of Mansfield.

*N. R. Clarke*, in support of the order of sessions. Relief given to a pauper out of the relieving parish, is *prima facie* evidence that the pauper at that time is settled there. The relief given in this case was some evidence of an admission by the parish officers of Edwinstowe, that the pauper was so settled, and the presumption arising from that evidence was not rebutted. There were premises to warrant the conclusion drawn by the sessions, that the pauper was settled in Edwinstowe. It was a question for the sessions, and they have decided it.

*Fynes Clinton, contra.* The sessions have drawn a wrong conclusion from the evidence. The giving of relief amounts to no more than showing the opinion of the parish, that the pauper was settled there, *Rex v. The Inhabitants of Maidstone*, 12 East, 553. But here it appears that the relief was given by the parish officer when he was away from home, and had no opportunity of ascertaining whether the pauper was settled in Edwinstowe or not, and he and the other parish officer took the first opportunity of setting themselves right, when the pauper applied a second time. The relief was clearly given under mistake, and there were no premises to support the decision of the justices at sessions.

BAYLEY, J. I agree with Mr. *Clinton*, that if there be not any premises to warrant the conclusion to which the justices at sessions have come, we are bound to reverse their decision. I do not say that, from the facts stated in the case, I should have drawn the same conclusion which the justices have done. But it was a question of fact; and it was for them to draw their conclusion from the evidence. Before we reverse their decision, we must see clearly that they were wrong. It is not sufficient that the evidence in support of their conclusion is slight. The question is, Whether there was any evidence to warrant the justices in coming to the conclusion? It appears that at the time when the relief was given, the parish officer was at a distance from home. It is possible, however, that he may have known that the pauper was settled in Edwinstowe. If he did not know it, he might have said to the pauper, "I cannot tell whether you are settled in the parish or not, and I give you this whether you are settled there or not." But he gave the relief in an unqualified manner, and seems to have acted on the principle, that he conceived there was an obligation on his part to grant relief, and a right in her to demand it. It was for the sessions to draw their conclusion from these facts. There was some evidence upon which they might exercise their discretion; and though I might, perhaps, have come to a different conclusion, I think we are not at liberty to reverse their decision.

LITLEDALE, J. I concur in the judgment delivered by my Brother *Bayley*, entirely on the ground that there were some premises to warrant the sessions in coming to the conclusion to which they have come. The evidence was undoubtedly very slight; but it was for the sessions to draw their conclusion from it, and having done so, I think we ought not to disturb their decision.

PARKE, J. Upon the evidence stated in this case, I should have come to a different conclusion. But it is for the sessions and not for us to draw the conclusion from the evidence given, and they having done so, I think their decision ought not to be disturbed.

Order of sessions confirmed.

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The KING v. The Inhabitants of ST. MARTIN, IN LEICESTER.—p. 674.

Where the court of quarter sessions have, from facts proved before them, drawn the conclusion, that there was an implied hiring for a year, this Court will not, upon a case sent to them by the sessions stating those facts, disturb that decision, if there appear any premises whatever to warrant it.

UPON an appeal against an order of two justices, whereby F. Ward, his wife and children, were removed from the parish of Great Bowden, in the county of Leicester, to the parish of St. Martin, in the borough

of Leicester, the sessions confirmed the order, subject to the opinion of this Court, on the following case :

The pauper, being then about fourteen years old, went in company with his father to the house of one Neale, an innkeeper in the parish of St. Martin, and informed Neale that he heard he wanted a lad. Neale answered, that "he had got one coming in a fortnight, but that pauper might stay for that fortnight till the other lad came." The pauper was to fill the situation of boots and tap-boy. He was to have his board and lodging in the house, and the vails which he might obtain in this employment. At the end of the fortnight the other lad came, but was not engaged by Mr. Neale, and the pauper continued in the service (without anything following between him and Neale) for a period of three years and a quarter, at the end of which time the pauper, hearing that the place of ostler at another inn was vacant, went and engaged it without consulting his master, and removed into it on the following day ; Neale telling him, that if it was his mind to go, he believed he must. The court of quarter sessions found that there was an implied hiring for a year, and confirmed the order.

*Jeremy* (and *Humphrey* was with him) in support of the order of sessions, was stopped by the Court.

*Denman* and *Reader*, contra. The facts stated in this case did not furnish any premises from which the justices could fairly draw the conclusion that there was a contract for a year's service. There must be a contract, *Gregory v. Pitminster*, 2 Bott. 183. Now, there was no contract whatever in the first instance. The pauper was merely told that he might stay for a fortnight, till the other person (who was expected) should come. Assuming, however, that the sessions might thence infer a contract for that time, there was no subsequent agreement between the parties. There was, consequently, no obligation on the pauper to continue to serve beyond that time. He might, therefore, have quitted when he pleased. Now, an express contract of hiring, with a stipulation that it may be determined at pleasure by either party, is not a hiring for a year: *Rex v. Christ's Parish, York*, 3 B. & C. 459 ; *Rex v. Trowbridge*, (cited in *Rex v. Christ Parish, York*) ; and *Rex v. Great Bowden*, 7 B. & C. 249. Where there is no contract, no hiring can be presumed from length of service: *Rex v. Weyhill*, Burr. S. C. 491, 2 Bott. 185. There was no general hiring in this case which would undoubtedly be a hiring for a year. The first hiring was for a fortnight only, and it is expressly found that the pauper afterwards continued without anything further passing between him and his master. The presumption, therefore, of any hiring for a year, is repelled.

BAYLEY, J. I think that the justices were warranted in coming to the conclusion that there was an implied hiring for a year in the parish of St. Martin, Leicester. It appears that the pauper applied to Neale, and asked him if he wanted a servant. If Neale, who agreed to take the pauper into his service, had said no more than that he should have his board and lodging and the vails, that would have been a case in which the law would imply a general hiring. But the master assigns as a reason why he would not make a contract to hire the pauper for any longer period than a fortnight, that he expected another lad to come in a fortnight. The other lad did come, but he was not engaged. The pauper then continued in the service of Neale, nothing further having been said as to the terms or the period of service. Then the question for the consideration of the justices was, Whether the relation of master and servant

was created between the parties, and for what period? That question depended on the understanding existing in the minds of the parties at the time. There can be no doubt that both parties understood that the relation of master and servant was created for a fortnight in the first instance. If the justices thought that the master refused to take the pauper for a year, only because he expected another person, they might, as that person was not finally hired, taking into consideration the conversation between the pauper and the master, and the subsequent service, presume that there was a contract for a year. They might most properly have so presumed, if the master, in the first instance, had hired the pauper without having said that he expected another person to come in a fortnight. If the conversation between the master and the pauper, omitting all mention of any other person being expected, coupled with the subsequent service, would have been sufficient to raise a presumption of a yearly hiring, the justices might think that as the person so expected was not finally hired, both parties intended the relation of master and servant to continue for that period. I think, therefore, there were some premises to warrant the sessions in coming to the conclusion that there was a hiring for a year. The case of *Rex v. Pendleton*, 15 East, 449, is in point. There a pauper served a master under unstamped articles of agreement, to work with him for three years at certain rates of weekly wages, and under certain covenants; after which he continued to serve his master for four years longer without coming to any new agreement. It was held, that the sessions might thence presume a yearly contract. In that case there was no new agreement between the parties, and the Court inferred that the relation of master and servant existed. In this case, the justices at Sessions were the proper persons to judge in what character the parties continued together after the master had refused to engage the other person whom he expected. They have exercised their judgment on that point, and I think their decision ought not to be disturbed.

LITLEDAL, J. I should have drawn a different conclusion from the facts stated. But it was a question of fact for the justices to decide whether there was a contract for a year. There were premises to warrant them in coming to that conclusion, and upon that ground only I found my opinion that the decision of the sessions ought not to be disturbed.

PARKE, J., concurred.

Order of sessions confirmed.

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The KING v. ST. ANDREW in PERSHORE, WORCESTER-SHIRE.—p. 679.

A hiring at so much per week, a month's wages or a month's warning, is a hiring for a year.

UPON an appeal against an order of two justices, whereby W. Horton, his wife, and two children, were removed from the parish of St. Andrew, in Pershore, in the county of Worcester, to the parish of Moreton, in Marsh, Gloucestershire, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper, W. Horton, was hired to one Fieldhouse, a stage-coach proprietor, to serve him as horsekeeper, and to look after his coach-horses at Moreton, in Marsh, at 1*l.* a week. The terms of the hiring were a month's warning, or a month's wages. There was no further mention of the time during which the pauper should serve. The pauper continued to serve under this contract at Moreton in Marsh between two and three years. The question for the opinion of the Court was, Whether the pauper, W. Horton, gained a settlement under this hiring and service in Moreton in Marsh.

*Godson* in support of the order of sessions. By the contract, weekly wages were reserved. That, *prima facie*, raises a presumption that the service was to continue for a week only. It is true that there was a stipulation for a month's wages, or a month's warning. That, at most, would raise a presumption of a monthly, not a yearly hiring.

*Campbell*, *contra*, was stopped by the Court.

RAYLEY, J. I think that the sessions had not any premises to warrant the conclusion to which they came in this case. If the reservation of weekly wages be the only circumstance from which the duration of the contract can be collected, the presumption is, that it is to continue for a week only. In this case, the stipulation for a month's wages, or a month's warning, rebuts the presumption of a weekly hiring. It was thence manifest that it was intended that the service should continue for a longer period than a week. It then became a hiring unlimited in duration, in which the case the law implies a hiring for a year.

LITTLEDALE, J. The stipulation for a month's wages, or a month's warning, shows clearly that the contract was for a longer than a week. That being so, and no precise time for its duration being fixed, it was a contract for an indefinite period; or, in other words, a general hiring for a year. I think that in this case there were not premises to warrant the sessions in deciding that there was not a yearly hiring.

PARKE, J., concurred.

Order of sessions quashed.(a)

(a) See *Rex v. Hampreston*, 5 T. R. 205. *Rex v. Great Yarmouth*, 5 M. & S. 114.

### The KING v. WILLIAMS. — p. 681.

To a *mandamus* to admit A. B. into the office of churchwarden, reciting that he had been duly elected, a return that A. B. was not duly elected, is good.

*MANDAMUS* to the defendant, as official and commissary of the parish of Hornchurch and liberty of Havering-atte-Bower, in the county of Essex, to swear and admit into the office of churchwarden James Meakins. The *mandamus* recited, that he had been duly nominated, elected, and chosen into the place and office of churchwarden of the said parish. The defendant having returned, that Meakins was not duly elected into the place and office of churchwarden, the case now came on for argument in the crown paper.

*Brodrick*. The return is insufficient. The commissary had no right to exercise any judgment on the subject. He was a ministerial officer, and was bound to swear in the churchwarden, *Rex v. Rice*, *Ld. Raym*

188, *Rex v. Simpson*, Str. 610. In *Rex v. White*, Ld. Raym. 1879, to a mandamus to swear in a churchwarden, a return that he was not elected, was held bad, on the ground that the archdeacon could not judge of the election. *Rex v. Harris*, 8 Burr. 1420, is an authority to the same effect. These authorities show that a return denying the election is bad. Here the return is that Meakins was not *duly* elected. The commissary, therefore, exercised his judgment, not only as to the fact of the election, but as to the validity of it. *Hereford's case* and *Cripp's case*, 1 Sid. 209, show that such a return is bad.

*Erle*, contra, was stopped by the Court.

BAYLEY, J. At the end of the report of *Rex v. White*, Ld. Raym. 1879, Lord *Raymond* adds a note, "It was certainly wrong, for the return was a good return, and has been often made to such mandamuses and actions brought upon the return, and tried;" and he refers to *Rex v. Harwood*, Ld. Raym. 1405. There the mandamus was directed to the defendant, a commissary, commanding him to swear in a churchwarden, and he returned non fuit electus; and it was insisted that the return was ill, that the archdeacon, who was only to obey the writ, could not judge of the election or of the qualities of a person chosen by the parish. But *Raymond*, C. J., and *Reynolds*, J., took the return to be good. But, being pressed with the authority of *Rex v. White*, and no counsel for the defendant appearing, a rule nisi was made for a peremptory mandamus. Cause was afterwards shown; but the Court not being unanimous, it was ordered to come on again in the paper. Lord *Raymond* says, "I never heard it stirred again. There can be no doubt that it was a good return." In *Rex v. Ward*, Strang. 894, it was said in argument to have been decided in *Rex v. Harwood*, that non fuit electus was a good return. In the *Queen v. Twitty*, 2 Salk. 433, there was a mandamus to swear a churchwarden, suggesting that he was duly elected. The return was, that he was not duly elected. It was objected, that it was not a good return. Holt, C. J., says, "Where the writ is to swear one duly elected, there a return that he was not duly elected is a good return, for it is an answer to the writ; but where it is to swear one chosen churchwarden, there a return that he is not duly chosen is naught, because it is out of the writ, and evasive." These authorities show that the return in the present case is good.

LITLEDAL, J. The commissary has a right to say by the return, that he is not bound to do the thing which he is required to do by the mandamus. Here he does say so, by showing that the party was not duly elected.

PARKE, J. The commissary may deny any material allegation in the writ. He cannot exercise any judicial authority, but he may inquire whether the party has been duly elected, otherwise he would be bound to admit any person who presents himself for admission, even if he knew the fact to be that such person was never elected. The party who obtains the mandamus states the foundation of his right in the writ. The commissary may deny it. In this case he has done it, by showing that the party who seeks to be admitted was not duly elected. The return, therefore, is sufficient, and the judgment must be for the defendant.

Judgment for the defendant. (a)

(a) A return is good if it pursues the suggestion of the writ. *Rex v. Penrice*, Strange, 1235. *Rex v. Hill*, 1 Shower, 253.

## The KING v. The Inhabitants of GREAT DRIFFIELD.—p. 684.

A man living in parish A. under a certificate from parish B. cannot gain a settlement in the former parish by purchasing an estate for money.

UPON an appeal against an order of two justices, whereby T. Harrison, his wife and children, were removed from the township of Great Driffield, in the East Riding of the county of York, to the township of Garton on the Wolds in the same Riding, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper, T. Harrison, never acquired any settlement in his own right. The pauper's grandfather resided at Garton; his son (the pauper's father), whilst living with him at Garton, was bound an apprentice to one Lyon, a shoemaker, who was then residing at Great Driffield, under a regular certificate from the parish of Kirkburn, as the pauper then knew. The indenture, which was in the usual form, and regularly stamped and executed by all parties, was dated the 25th day of March, 1786, and stated that the apprentice was thereby bound for the term of seven years, from (a blank being left in that part of the indenture for the time from which the apprentice was so bound). The apprentice served his master from the date of the indenture, until about five weeks previously to the expiration of the seven years in Great Driffield. Lyon had resided in Great Driffield from the year 1771 to the time of executing the indenture, and from thence until his death in 1793; but he, on or about the 10th of May, 1792, whilst the apprentice was so serving him in Great Driffield, purchased a cottage in Great Driffield for the sum of 110*l.*, of which 80*l.* was paid by him, and the remaining sum of 30*l.* was paid by one Elizabeth Day. And the same was thereupon duly conveyed by an indenture of feoffment, with livery of seisin indorsed, bearing date the 10th day of May, 1792, unto Lyon and his heirs, to the use of Elizabeth Day, her executors, administrators, and assigns, from the day next before the date thereof for the term of 500 years, subject to a proviso thereafter contained for redemption of the said premises, with remainder to the use of the said R. Lyon, his heirs, and assigns for ever. The said indenture also contained a proviso for making void the said term on payment by Lyon, his heirs, executors, administrators, and assigns, unto E. Day, her executors, &c., of the sum of 80*l.* with interest for the same, on the 10th of November then next, and Lyon occupied the cottage until his death. The apprentice served Lyon in Great Driffield for more than forty days after Lyon had purchased the cottage, and then resided with Lyon. The father of the pauper did no other act to gain a settlement; and if by the apprenticeship and service he gained no settlement in Great Driffield, the place of his and the pauper's last legal settlement is Garton, where the pauper's grandfather was legally settled.

The question for the opinion of this Court was, Whether, under the circumstances above set forth, the father of the pauper gained a settlement in Great Driffield, by being bound to and serving the said R. Lyon as aforesaid?

*Reader and Kennedy* in support of the order of sessions. The pauper's father gained a settlement in Great Driffield, by apprenticeship. By 12 Ann. c. 18, s. 2, no estate could be gained by the apprentice by service to a certificated man. But the master's certificate was discharged by his having brought an estate. The master, therefore, gained a settle-



ment by estate, and the apprentice gained a settlement by serving the master forty days after the certificate was discharged. First, the master gained a settlement by estate. The stat. 9 & 10 W. 3, c. 11, enacts, "that no person who shall come into any parish by certificate shall be adjudged by *any act whatsoever* to have procured a legal settlement in such parish, unless he or they shall really and bonâ fide take a lease of a tenement of the value of 10*l.*, or shall execute some annual office in such parish, being legally placed there." It will be said, that the statute prevents a man from gaining a settlement by any other than the two modes mentioned in the statute; and that to hold that a settlement is gained by the purchase of an estate for a pecuniary consideration, is a departure from the words of the statute. In *Burclew v. Eastwoodhey*, 1 Str. 163, it was held, that a certificated man might become settled by residence on his own estate, where it did not come to him by any act of his own, but by act and operation of law. In *Ivinghoe v. Stonebridge*, Str. 265, the Court were of opinion that an apprentice who had lived forty days in a parish, after his master, who was certificated, had purchased an estate, gained a settlement. There, the apprenticeship having expired before the 12 Ann. c. 18, it was unnecessary to decide the question. In *Rex v. Stanifield*, Burr. S. C. 205, it was held, that leasehold property which descended to a certificated person, gave a settlement. *Lee, C. J.*, there said, "The statute 9 & 10 W. 3, hath received a liberal construction, and hath been held to give a settlement, both by descent, by devise, and purchase. *Rex v. Deddington*, Burr. S. C. 220, was the case of a certificated man, who purchased an estate for 42*l.*, and there it was insisted that it was distinguishable from *Burclew v. Eastwoodhey*, because, in that case, it was not his own act (as a purchase is) but it came to him by act and operation of law. But the Court did not think this a sufficient distinction, and said a purchase was in its nature an excepted case.

*Alderson and Archbold*, contra. The words of the statute 9 & 10 W. 3, c. 11, are decisive upon this point. They in express terms prevent a certificated man from gaining a settlement subsequently to his coming into the parish by any other act than by renting a tenement of 10*l.* a year, or by executing some annual office. The purchasing of an estate is an act done by the party, but it is not one of the acts mentioned in the statute. The statute says, that such a person shall gain a settlement only by two acts. It is contended that he may by a third. The cases in which it has been held that a settlement has been gained by an estate coming to a certificated man by act and operation of law, were correctly decided; for there the settlement is not procured by any act on his part. Such a case, therefore, is not within the prohibition of the statute. The case will be clear by examining the foundation on which this law of settlement depends. Originally a mere residence of forty days gave a settlement. Then came the 13 & 14 Car. 2, by which justices of peace were empowered to remove persons coming to settle on a tenement of less than 10*l.* within the forty days. But even these persons after forty days gained a settlement as before. By the 3 W. & M. c. 11, however, the forty days mentioned in the 13 & 14 Car. 2, were to be computed from the delivery of a notice in writing. This introduced the distinction between removable and irremovable persons. In the latter class the forty days were computed from the original coming to settle as before. But this statute enumerated several other acts whereby a settlement could be gained, such as service, apprenticeship, executing an office, or paying rates. These were in addition to the act of taking a tenement before mentioned in the 13 & 14 Car.

2. Then came the 9 & 10 W. 3, by which a certificate man was prohibited from gaining a settlement by any act except *two* of those mentioned in the former statutes: and this is confirmed by the recital, which mentions the doubt whether the certificate was not of itself a notice in writing, so as to bring the party within the 3 & 4 W. 3. Notwithstanding the statute of 9 & 10 W. 3, however, a certificate man might have gained a settlement by residing on his own estate, whatever the value might be, if it came to him not by any act on his part, but by descent. For such persons were irremovable before the 9 & 10 W. 3, and have continued so ever since, the prohibition not applying to them. But, secondly, assuming that the master could gain a settlement, the pauper could not. For the statute 3 & 4 W. & M. c. 11, makes the binding and inhabitation a good settlement. There must be, therefore, a good binding and a good inhabitation. There was no good binding, because it took place before the purchase, and the certificate act prevents a person living under a certificate from taking an apprentice, so as to throw a burden on the certified parish.

*Cur. adv. vult.*

BAYLEY, J., now delivered the judgment of the Court:

The question for our consideration is, Whether the pauper's father gained a settlement in the township of Great Driffield by serving as an apprentice to a person who resided there under a certificate from another parish. In support of the order of sessions, it was contended that he did; because the certificate was discharged by the master's having acquired a settlement in Great Driffield, by the purchase mentioned in the case; and if so, it was argued, that the subsequent service to the master, after he ceased to reside under the certificate, though by virtue of a binding made to him whilst he was so residing, was sufficient to confer a settlement on the apprentice. It is unnecessary to decide the latter question, if no settlement was gained by the master, by the purchase which he made; and we are of opinion that no settlement was gained. The statute 9 & 10 W. 3, c. 11, after reciting the 8 & 9 W. 3, c. 80 (the certificate act), and also reciting that some doubts have arisen upon the construction of the said act, by what acts any person coming to inhabit and reside within any parish, by virtue of any such certificate, may procure a legal settlement in such parish, enacts, "that no person or persons whatsoever, who shall come into any parish by such certificate as aforesaid, shall be adjudged, *by any act* whatsoever, to have procured a legal settlement in such parish, unless he or they shall really and bona fide take a lease of a tenement of the value of 10*l.*, or shall execute some annual office in such parish, being legally placed in such office." By the express words of this statute no settlement can be obtained by the certificated pauper, by any act whatsoever; that is, as the context shows, by any act whatsoever done by the pauper, other than the two which are pointed out by the act. The purchase by the pauper of an estate, for a sum of money, is an act done by him other than those mentioned in the statute; and, according to the plain and ordinary import of its words, he cannot procure by it a settlement in the parish. But we are bound to construe every statute according to the plain and ordinary import of its words, and to act upon that construction, unless we should find ourselves bound by an uniform course of well-considered decisions, giving a different effect to the provisions of the statute; or unless that construction would lead to such consequences, that we can safely pronounce that the legislature must have had a different intention from that which the ordinary import of the words conveys.

It will be found, however, upon referring to the several decisions, that they are few, and that they are founded in some degree upon a mistaken supposition that the point properly arose and was decided in the first reported case upon this subject. That case was between the parishes of *Burclear* and *Eastwoodhey*, 1 Str. 163, Burr. S. C. 221, in which it was held, that where a certificated pauper acquired an estate, in right of his wife, which was surrendered to her by her father, his certificate was discharged, and he gained a settlement; and it is stated in the judgment that he did not come in *by an act of his own*, but that the estate was cast upon him by act and operation of law. Other reasons are, it is true, assigned in the judgment of the Court, but it may be supported upon that ground; for a settlement acquired by operation of law, is not acquired by any act of the pauper, and is, therefore, not prohibited by the statute 9 & 10 W. 3. In that case, one Hackett lived in the parish of *Eastwoodhey*, with a certificate from *Burclear*; his wife's father surrendered to her use a copyhold in *Eastwoodhey*, upon which they resided five years, and then the wife died. The husband afterwards asked relief in *Eastwoodhey*, from which he was removed to *Burclear*; and the question was, Whether his residence upon this copyhold gave him a settlement in *Eastwoodhey*? and, per Curiam, "The 9 & 10 W. 3, is not explanatory, but new; and, therefore, to receive a liberal construction. The exceptions in the statute prove this case more reasonable than either of those mentioned. If a certificate man, by taking a tenement of 10*l.* a year, gain a settlement *à fortiori*, shall he who has an estate of his own, especially in this case, *where he does not come to it by his own act*, which might savour of fraud, but it is cast upon him by the act and operation of law? If he who serves a parish office gains a settlement by reason of his presumed ability, with greater reason shall he who has ability of his own visible to all the world. It has been adjudged that any other person, by the descent or purchase of a freehold or copyhold, or by becoming entitled to a lease for years, gains a settlement; and it cannot be supposed the legislature intended to put a certificate man in a worse condition." The Court, therefore, seemed to think that a certificated man might gain a settlement by estate coming to him by purchase. But that was not a case of purchase; and where an act of parliament says, in distinct terms, that a certificated man shall gain a settlement in two modes only, we are not at liberty to say he may gain it by any other. There the estate came to the pauper, not by his own act, but by act and operation of law—by voluntary surrender of the copyhold to his wife. That case occurred before the 9 G. 1. At that period a party might gain a settlement by the purchase of an estate of any amount. The next case was *Ivinghoe v. Stonebridge*, 1 Str. 265. This case decided that an apprentice to a certificated man gained a settlement in the year 1709, because it was prior to the statute 12 Anne, prohibiting such apprentices from gaining a settlement. The opinion of the Court that the purchase of an estate made the certificate man a settled inhabitant, was expressly founded on the decision in the former case of *Burclear v. Eastwoodhey*, and was, also, extrajudicial. These two cases are not of sufficient weight to induce us to say, in the teeth of the words of the act of parliament, that a settlement may be gained by purchase, which is an act done.

I come now to cases where the estates have been acquired by purchase for money. The first case of a purchase for money by a certificated man is the *King v. Stansfield*, Burr. S. C. 205, where a purchase by the pauper, for 4*l.* paid by him, of a leasehold estate in the certificated town

ship, was held to gain him a settlement. It is material to look at the language used by the Court in their judgment. Lord C. J. *Lee* says, "I do not know that the 9 & 10 W. 3, has been taken so strictly as the counsel would suppose. A descent or devise, and, I believe, a purchase too, has been determined to gain a settlement after forty days' residence upon the foot of a person not being removable from his own, and as not being an intruder within the meaning of the 13 & 14 Car. 2, c. 12; so that, whenever a man has an interest of his own, though under 20*l.* a year, he shall not be removable by that statute. The present question turns, indeed, upon the construction of the certificate act. Now, though this person was a certificate-man, yet, if he had come to this by *act of law*, it would have gained him a settlement; and, I believe, it has been so determined in case of purchases too. I think the same construction has been made upon this act as upon that of the 13 & 14 Car. 2." In the following term, in the case of *Rex v. The Inhabitants of Deddington*, Burr. S. C. 220, 2 Str. 1193, it was decided, that a purchase by the certificated man for the sum of 42*l.* gained a settlement, expressly upon the authority of *Burclew v. Eastwoodhey*. Lord C. J. *Lee* says, that, in that case, the purchase was most plainly neither of the two cases mentioned in the act; and he observes, that a purchase was a matter of as much notoriety or more than the renting of a tenement of 10*l.* a year; that the construction ought to be agreeable to that which has been put on the 13 & 14 Car. 2, c. 12, under which any man is irremovable from a tenement of his own, and that if the construction were different, a person could not gain a settlement by a purchase of 5000*l.* per annum. In *Rex v. Cold Ashton*, Burr. S. C. 444, 2 Bott, 530, D. Harrison and wife lived in Cold Ashton under a certificate from Woodchester. The wife's father died intestate, leaving a leasehold for ninety-nine years in Cold Ashton, determinable on lives. D. Harrison and wife lived upon it twenty-nine years. *It came to the husband, not by his own act, but by act of law.* Lord Mansfield said, "The question is, Whether he is within the 9 & 10 W. 3, which mentions only two methods whereby certificated persons can gain settlements? But an estate of a man's own, from which he cannot be removed, has been by construction (and a reasonable one, too) held not to be within the act, for it would be hard to remove a man from his own. The principle of the determination is, because property of a man's own is a stronger case than hiring another person's of 10*l.* a year value." It should be remembered, however, that although a man may not be removable from his own, it does not follow that he will gain a settlement by residing on it. In *Rex v. Long Wittenham*, 2 Bott, 531, Mich. term, 24 G. 3, J. Westal was certified in Upton; he bought a cottage for 5*l.*, lived in it nineteen years, and died. His widow Jane lived on it ten weeks after his death, and the question was, whether she thereby gained a settlement. Lord Mansfield, C. J., "Magna charta says that a widow shall have her forty days; and, therefore, there is no doubt she was irremovable for forty days, and thereby gained a settlement." The estate in that case came to the pauper by her husband's death. In *Rex v. Warblington*, 1 T. R. 241, the pauper's father lived under a certificate in Warblington. The lord of the manor of Havant had granted him a part of the waste, and he built a house upon it, and lived in it. It appeared that there had been a usage for the lord of the manor to grant parcels of the waste for small pecuniary considerations, and that the pauper was admitted upon payment of 1*s.* fine, 1*s.* heriot, and 1*s.* quit-rent. It was insisted that this

grant was voluntary, and vacated the certificate. But the Court decided, that such a grant of a copyhold, with 1s. fine, and 1s. heriot, was a purchase within the 9 G. 1, c. 7, s. 5. I mention the case to show what was the impression on the minds of *Ashhurst* and *Buller*, J., as to the construction of the statute 8 & 9 W. 3. *Ashhurst*, J., says, "If it were necessary to give any opinion upon the point, whether, supposing this to be a voluntary grant, the party would gain a settlement, I should have wished the matter to have undergone further discussion. It seems extraordinary that, in the teeth of an act of parliament, this matter should have been taken for granted; nothing can be stronger than the words of the certificate act (which he then recites). It is singular that a practice should have prevailed in opposition to this act of parliament, when the words are so strong." *Buller*, J., says, "I reserve to myself the consideration of the question, what effect a voluntary gift would have on a certificate-person as to the giving of a settlement. I agree that, under the act of the 9 G. 1, c. 7, s. 5, the word '*purchase*' has not the same extensive sense as is generally annexed to it. But no case has been cited at the bar, where a certificate has been discharged by a voluntary gift." These two learned Judges must have been satisfied that there was a material distinction between a case, where the estate was obtained by purchase, and where it was obtained by voluntary gift.

We do not feel ourselves bound by these decisions to put a construction upon the statute at variance with the plain and ordinary meaning of its words. It is clear that these decisions have proceeded in part upon a misapprehension of the precise point decided in the case of *Burclear v. Eastwoodhey*. The other reasons assigned in giving these judgments do not appear to us satisfactory; the thing seems to us to turn upon the notoriety of the purchase. There is no question whether the certificated man would be removable during the time of his living in the parish, and being the proprietor of an estate, but whether he acquired a settlement; and with respect to the similarity of construction to be put upon this statute, as on the 13 & 14 Car. 2, it is to be observed that the words are very different, and that, looking at the recital in the latter statute, which applies to poor persons going from one parish to another, and endeavouring to settle themselves where there is the best stock, and at the enactment which authorises the removal of *such* persons only as are mentioned in the recital, it is clear that it never meant to apply to persons who had estates in the parish in which they came to settle. We think, also, that no mischief will follow from the construction which we put on the statute of 9 & 10 W. 3, for though, on the one hand, according to that construction, a certificated man would gain no settlement by purchase of a large estate; on the other, he would be disabled from burthening the certificated parish by making a purchase of an estate for a very small consideration, which he might have done prior to the 9 G. 1 c. 7, s. 5.

The other cases of settlements acquired by certificated persons, may be supported on the ground that the estate came by operation of law, as in *Rex v. Cold Ashton*, or by voluntary conveyance from another, as in *Rex v. Ufton*, 3 T. R. 251, which may, perhaps, be considered as an estate not acquired by any act done by the party.

We are, therefore, of opinion, that the statute 9 & 10 W. 3 prevents any settlement, by reason of an estate acquired by the act of the pauper, by a purchase in the ordinary and usual sense of that word; but it does not prevent the acquisition of a settlement by reason of an estate devolving

on the pauper by operation of law, or acquired by purchase, in the technical sense of that word.

Order of sessions quashed.

DANIEL EDGE v. PARKER.—p. 697.

Where the assignees of a bankrupt enter the premises of a third person to seize goods, which were the property of the bankrupt, it is not necessary that an action against them should be brought within three months after the fact committed; the act of the assignees not being done "in pursuance of the statute," within the meaning of the 6 G. 4, c. 16, s. 44.

TRESPASS for breaking and entering the premises of the plaintiff, and seizing his goods. Plea, not guilty. At the trial before *Park, J.*, at the last Spring assizes for Staffordshire, it appeared that the defendant as assignee of Timothy Edge, a bankrupt, on the 6th of October, 1827, entered the plaintiff's premises, and seized certain goods, which the jury found were the property of the bankrupt; the writ was not sued out until the 25th of January, 1828, and it was objected for the defendant, that he was protected by the 6 G. 4, c. 16, s. 44, (a) the action not having been commenced within three calendar months after the fact committed. The learned Judge overruled the objection, and the plaintiff obtained a verdict for the breaking and entering, but not for the taking of the goods. In Michaelmas term a rule nisi for a nonsuit was obtained, against which

*Campbell* now showed cause. The protection given by the forty-fourth section of the 6 G. 4, c. 16, does not extend to such cases as the present. If it were otherwise, the greatest injustice might be done. A party whose goods had been wrongfully taken, might be abroad or otherwise absent from home, and not know anything about the trespass until after the expiration of three months; he would then be altogether without remedy, although there could be no doubt as to the injustice of the seizure. The words of the forty-fourth section will be satisfied by applying them to the actions against commissioners mentioned in the forty-first, forty-second, and forty-third sections, and to those mentioned in section 81, against persons acting in obedience to a warrant granted by commissioners. The assignees of the bankrupt are not mentioned in any section preceding the forty-fourth, and cannot have been contemplated as parties to be protected by it. Subsequent parts of the act give them a title to all the bankrupt's property, but they are not directed to seize, and, therefore, the act complained of in this case cannot properly be said to have been done "in pursuance of the act;" and, unless so done, it is not within the protecting clause, even supposing it to apply to assignees.

*Richards*, contra. The assignees of a bankrupt are within the protection of the forty-fourth section. The defendant took the property

(a) By which it was enacted, that "every action brought against any person for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed; and the defendant or defendants in any such action may plead the general issue, and give this act and the special matters in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants; and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs."

in question for the purpose of making a dividend amongst the creditors of the bankrupt, and, therefore, was acting "in pursuance of the statute." That expression does not mean that the act done should be strictly within the powers given, for then the limitation of the action would be useless, for the assignee would be at all events justified. It must have been intended to apply to cases where the assignee has acted *bonâ fide* with the intention to do only what is right, but has exceeded his authority. There are many cases in which the protection given by the 24 G. 2, c. 44, s. 8, has been extended to constables professing to act under a warrant, but exceeding the powers given by it. In *Parton v. Williams*, 3 B. & A. 330, a warrant had been granted directing a constable to seize the goods of A.: he took the goods of B., supposing them to be A.'s, and was held to be protected by the statute. *Theobald v. Crichtmore*, 1 B. & A. 227; *Smith v. Wiltshire*, 2 B. & B. 619, and *Gaby v. The Wilts Canal Company*, 3 M. & S. 580, are to the same effect. It has been said that the forty-fourth section applies only to commissioners, and those who act in obedience to their warrants. But the words of the act are general. That *every* action brought against *any person*, for anything done in pursuance of that act, shall be commenced within three calendar months next after the fact committed; and there does not appear to be any good reason why the protection should be given to commissioners and not to assignees.

*Cur. adv. vult.*

On a subsequent day, during the sittings, the judgment of the Court was delivered by

BAYLEY, J. The only question in this case is, Whether the defendant is within the protection given by the 6 G. 4, c. 16, s. 44? which he cannot be unless the act complained of was done in pursuance of that statute. It is not necessary to cite cases to show that the expression "in pursuance of" is applicable only where the party can be considered as founding his act upon the power given by the legislature. Can, then, this defendant be considered as founding the act complained of upon the powers vested in him by the statute? The twenty-seventh section gives power to any person appointed by the commissioners, by their warrant under their hands and seals, to break open any house, chamber, shop, warehouse, door, trunk, or chest of *any bankrupt*, where such bankrupt or any of his property shall be reputed to be, and seize upon the body or property of such bankrupt. That does not give power to break open all houses, &c., where the bankrupt's property is reputed to be, but only any house, &c., of the bankrupt. In the twenty-ninth section a power is given to search the houses of third persons, where the property of the bankrupt is suspected to be concealed; but in that case a warrant must be obtained from a justice of peace by the person appointed by the commissioners. Then follow clauses requiring a certain notice before any action shall be brought against the commissioners, and proof of such notice; and power is given to the defendants to tender amends. Then the clause in question is introduced; and it is to be observed, that the assignees of the bankrupt are not mentioned in the preceding part of the statute. That clause requires that every action brought against *any person*, for anything done in pursuance of the act, shall be commenced within three months next after the fact committed. Was then the act of the defendant, for which this action was brought, done in pursuance of the statute? That does not give the assignee any express power to seize the goods of the bankrupt, but vests the property in him, and clothes him

with all the rights resulting from the ownership of the property. But although the ownership is given to him in this manner, his acts as owner are not done in pursuance of the statute. If this were otherwise, the goods of a party abroad and wholly unconnected with the bankrupt might be seized, and he might lose all his property, and be entirely without remedy. The right construction of the clause appears to be this: if the assignee does an act directed by the statute, but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, that is not done in pursuance of the statute, and he is responsible for it. This point has been already decided by the Court of Common Pleas in *Carruthers v. Payne*, 5 Bingh. 270, and although *Gaselee, J.*, had some doubts upon the question, yet we think that decision is consistent with sound reason, and that we ought to come to a similar conclusion in this case. The verdict found for the plaintiff ought, therefore, to remain undisturbed.

Rule discharged.

### BENNETT v. EDWARDS.—p. 702.

An assistant overseer appointed under the 59 G. 3, c. 12, and having, by virtue of his office, the poor-rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant when lawfully demanded, according to the 17 G. 2, c. 3.

Where a declaration alleged that defendant was assistant overseer; that a rate for the relief of the poor was made and duly allowed; and although defendant, as such assistant overseer, had the rate in his possession, and although plaintiff, at a reasonable time, demanded an inspection of it, and tendered 1s., yet defendant refused to produce it, whereby he forfeited 20l.: Held, on motion in arrest of judgment, that the count was sufficient; for if the defendant had the rate in his custody as assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded.

ON the second trial(a) of this case at the Gloucester Spring assizes, 1828, before *Park, J.*, a verdict was found for the plaintiff on the fourth count, which alleged:—That plaintiff, before and at the time of the committing of the offence thereafter mentioned, was an inhabitant of the parish aforesaid; and that before and at the time, &c., defendant was the assistant overseer of that parish. And that, theretofore, to wit, on, &c., at, &c., the churchwardens and overseers made a certain rate for the relief of the poor of the said parish, and which rate was afterwards and before, &c., allowed by, &c., and published by the churchwardens and overseers of the poor of, &c.; and that afterwards, and at a reasonable time, to wit, &c., plaintiff requested defendant, as such assistant overseer, to permit him, plaintiff, to inspect the said rate, and then and there tendered to him 1s. for the same. And although the defendant then and there (as such assistant overseer) had the said rate in his possession, yet he would not permit the plaintiff to inspect it, whereby defendant forfeited for such offence 20l., &c. In last Easter term *Taunton* obtained a rule nisi for arresting the judgment, on the ground that it was not averred in the declaration, that it was the duty of the defendant, as assistant overseer, to exhibit the rate to the plaintiff when requested.

*Campbell* now showed cause. When this case was before the Court on the motion for a new trial, it was held that an assistant overseer appointed under the 59 G. 3, c. 12, s. 7, would be liable to the penalty imposed by

(a) See the report of the case on a motion for a new trial, 7 B. & C. 586.



the 17 G. 2, c. 3, for refusing to allow an inspection of the rate, provided the duty of keeping and exhibiting the rate-book was cast upon him by his appointment. After verdict it must be presumed, that everything alleged was proved; the only question therefore is, Whether it sufficiently appears on the declaration that it was the duty of the defendant to exhibit the rate? The 17 G. 2, c. 3, gives the right to inspect the rate against every person who, by reason of his office, has the custody of it. Now it is alleged that the defendant, an assistant overseer, had the custody, of the rate; he must, therefore, have had it by virtue of his office, and consequently was bound to produce it when requested so to do.

*Taunton, Ludlow, Serjt., and Justice, contra.* The declaration does not bring the defendant within either the words or the meaning of the 17 G. 2, c. 3. The words are, "That the churchwardens and overseers of the poor, or other persons authorised to take care of the poor in every parish, &c., shall permit all and every the inhabitants of the parish, &c., to inspect every such rate at all reasonable times," &c. The words, "other persons authorised to take care of the poor," were probably introduced to include persons mentioned in the 9 G. 1, c. 7, which authorises the farming out of the poor, and cannot apply to the present defendant. Under the 59 G. 3, c. 12, assistant overseers are appointed; but they are not like deputy overseers, they are not the representatives of the overseers in all their duties, but only in those for the discharge whereof they are specially appointed. The declaration should therefore have averred distinctly that it was the duty of the defendant, as assistant overseer, to produce the rate. The right of action is not founded on the mere possession of the rate by the defendant: he may have been entrusted with it for certain specific purposes, excluding the duty of exhibiting it. The allegation that the defendant had the rate, without the addition that it was his duty to produce it, is therefore insufficient: *Max v. Roberts*, 12 East, 89; *Rex v. Everett*, 8 B. & C. 114; *Sutton v. Johnstone*, 1 T. R. 493. It makes no difference that this motion comes after verdict, for the plaintiff was only bound to prove the facts alleged in the declaration, and it cannot be presumed that any others were proved, *Spieres v. Parker*, 1 T. R. 141; and, therefore, unless these facts disclose a good cause of action, judgment must be arrested.

BAYLEY, J. According to the case of *Spieres v. Parker*, nothing can be presumed after verdict except that which is expressly alleged in the declaration, or which is necessarily to be inferred from those allegations. Here it is not expressly alleged that it was the defendant's duty to exhibit the rate; but we must see whether any fact is alleged, whence that obligation on him is necessarily to be inferred. By the 17 G. 2, c. 3, the action is given against churchwardens, overseers, and persons authorised to take care of the poor; and it is therefore said that the defendant cannot be charged unless he falls within one of those three classes. I agree that he is not a person authorised to take care of the poor within the meaning of the statute. Neither is he a churchwarden. Is he, then, an overseer? Certainly not for all purposes, but for this I think he is. The statute 59 G. 3, c. 12, s. 7, authorises the appointment of assistant overseers; and every person so appointed is authorised to execute all such of the duties of overseer of the poor as shall in the warrant for his appointment be expressed. And, therefore, it is not sufficient to aver that the defendant was assistant overseer; but that must be stated which expressly or by necessary implication shows that he was an assistant

overseer with the duty in question cast upon him. If the duty of keeping the parish books and rates is imposed, I think the consequence follows that he must allow the inspection of them. If this were otherwise, the original overseer, when applied to for permission to inspect, might answer that he had them not; the assistant overseer might say that it was no part of his duty to exhibit them: and thus the 17 G. 2, c. 8, would be rendered inoperative. I am therefore of opinion, that when the duty of keeping the rate is imposed, the duty of allowing an inspection of it is imposed also. Now, in the count in question, it is alleged that the defendant, *as assistant overseer*, had the rate in his custody; but he could not have had it in his custody *as assistant overseer*, unless it was specified in his appointment that he should have it. The allegation in this count could not therefore be satisfied without proof of its being specified in the appointment that he should keep the rate; and if that was the duty of his office, the duty of allowing the inspection of it at reasonable times resulted from it. The plaintiff has alleged that his demand was made at a reasonable time. I am therefore of opinion, that after verdict the plaintiff is entitled to recover on this count of the declaration, although it is certainly very imperfect in form.

LITLEDALE, J. The statute 17 G. 2, c. 3, makes three descriptions of persons liable to a penalty for not allowing a poor-rate to be inspected — churchwardens, overseers, and persons authorised to take care of the poor. The defendant in the present case is not a churchwarden, nor a person authorised to take care of the poor, nor a complete overseer; but, on a former occasion, the court held, that an assistant overseer having possession of the rate-books, under circumstances that make it his duty to produce them, is an overseer within the meaning of the 17 G. 2, c. 3, s. 3, and liable to a penalty for refusing to do so. In the earlier part of the count in question, there is no allegation that it was the defendant's duty to produce the rate; but in the breach it is said, that he refused to do so, although he had possession of it as such assistant overseer, and was requested to produce it at a reasonable time. The duties of an assistant overseer are certainly undefined, nor can we tell correctly what they are without seeing the warrant by which he is appointed. The rate-book might be delivered to him for the purpose of collecting the rate only; but then the plaintiff must have been nonsuited; we are, therefore, bound to presume, after verdict, that the defendant was proved to be such an assistant overseer as made it his duty to produce the rate to the plaintiff; and in general we may presume, that when a person has the custody of parish books, as a parish officer, he has them for all lawful purposes for which they may be wanted. Upon the whole, then, I think our judgment should be in favour of the plaintiff, although there is only just sufficient on the record to turn the scale against the defendant.

PARKE, J. I also am of opinion, that there is just sufficient on the record to warrant a judgment for the plaintiff. I find it decided in *Bennett v. Edwards*, that a person to be within the 17 G. 2, c. 3, need not be an overseer for all purposes; and I think that decision correct. Now, the declaration before us states, that the defendant was an assistant overseer, which must mean an assistant overseer appointed under the 59 G. 3, c. 12, s. 7. I also find it alleged that he, as such assistant overseer, had the rate in his possession at the time when an inspection of it was demanded. According to *Spier v. Parker*, we must assume that it was delivered to him for some purpose connected with the duties of his office;

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overseer with the duty in question cast upon him. If the duty of keeping the parish books and rates is imposed, I think the consequence follows that he must allow the inspection of them. If this were otherwise, the original overseer, when applied to for permission to inspect, might answer that he had them not; the assistant overseer might say that it was no part of his duty to exhibit them: and thus the 17 G. 2, c. 3, would be rendered inoperative. I am therefore of opinion, that when the duty of keeping the rate is imposed, the duty of allowing an inspection of it is imposed also. Now, in the count in question, it is alleged that the defendant, *as assistant overseer*, had the rate in his custody; but he could not have had it in his custody *as assistant overseer*, unless it was specified in his appointment that he should have it. The allegation in this count could not therefore be satisfied without proof of its being specified in the appointment that he should keep the rate; and if that was the duty of his office, the duty of allowing the inspection of it at reasonable times resulted from it. The plaintiff has alleged that his demand was made at a reasonable time. I am therefore of opinion, that after verdict the plaintiff is entitled to recover on this count of the declaration, although it is certainly very imperfect in form.

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PARKE, J. I also am of opinion, that there is just sufficient on the record to warrant a judgment for the plaintiff. I find it decided in *Bennett v. Edwards*, that a person to be within the 17 G. 2, c. 3, need not be an overseer for all purposes; and I think that decision correct. Now, the declaration before us states, that the defendant was an assistant overseer, which must mean an assistant overseer appointed under the 59 G. 3, c. 12, s. 7. I also find it alleged that he, as such assistant overseer, had the rate in his possession at the time when an inspection of it was demanded. According to *Spieres v. Parker*, we must assume that it was delivered to him for some purpose connected with the duties of his office;

and, as those duties can only be some of the duties of the principal overseer, he would have the rate in the same way as the overseer himself. If so, it follows that he was bound to produce it when lawfully demanded, and is liable to a penalty for refusing to do so. If this were otherwise, the parishioners might be altogether deprived of the means of obtaining an inspection of the rate. The rule for arresting the judgment must therefore be discharged.

Rule discharged.

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The KING v. The Inhabitants of RAWDEN. — p. 708.

Upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for the same, the respondents, in order to show that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness on cross examination having stated that the letting was by a written instrument, this court held that it could be proved only by the production of that instrument.

Upon appeal against an order of two justices, whereby George Clayforth, his wife and children, were removed from the township of Idle, in the West Riding of Yorkshire, to the township of Rawden, in the same riding; the sessions confirmed the order, subject to the opinion of this Court on the following case: —

The respondents proved a settlement in the appellants' township. The appellants then set up a subsequent settlement gained in the respondents' township by the pauper's having been rated, and having actually paid the rates, in respect of a tenement of the annual value of 10*l.* 10*s.* in that township. It appeared that in December, 1823, he began to occupy the tenement, which was the property of Joshua Crompton, Esq.; that he occupied it for a twelvemonth, paid the rent for it, and also the rates, during all which time he resided in that township. In answer to this the respondents insisted that the pauper did not take the tenement of Mr. Crompton solely, but jointly with his father and father-in-law; and to prove this, they called Mr. Robinson, who was Mr. Crompton's steward at that time. He stated that he did not know who occupied the tenement in question. He was then asked, by the counsel for the respondents, who it was to whom he had let the tenement, and who were the tenants; whereupon the appellants' counsel interposed, and asked him whether there was not an agreement in writing; and on his admitting that there was, they objected that parol evidence of the letting and tenancy could not be received. The court of quarter sessions, however, permitted the question to be put, and the witness stated that he had let the tenement to the pauper, the pauper's father and father-in-law; that they were the tenants, and that they jointly delivered a notice to quit, but that he could not say whether this notice was signed with one or more names. Upon this evidence the court of quarter sessions confirmed the order.

*Blackburne* and *Dundas*, in support of the order of sessions. The

evidence was properly received. *Rex v. Holy Trinity, Hull*, 7 B. & C. 611, shows that the fact of tenancy may be proved by parol evidence, even though it appear that the tenant held by virtue of a written instrument. That case is precisely in point.

*Starkie*, (and *Milner* was with him,) contra, was stopped by the Court.

*BAYLEY, J.* The question in this case is, Whether the evidence of the steward was sufficient to rebut a prima facie case of tenancy, which was made out by the appellants. In *Rex v. The Holy Trinity, Hull*, the question at the sessions was, Whether the pauper came to settle on a tenement in the character of tenant. The proof was, that he occupied and paid rent. The Court thought that was prima facie evidence that he came to settle in the character of tenant. There can be no doubt that a party may, by keeping out of view a written instrument, make out by parol testimony a prima facie case of tenancy; and it then lies on the opposite party to rebut the prima facie case so made out. Here a prima facie case was made out by the appellants. The respondents attempted to vary that case by proving that in fact the premises were let to the pauper jointly with two others; but that letting was by a written instrument. It is quite clear that it could be proved only by the production of the written instrument.

*LITTLEDALE, J.* Robinson was called to prove who were the tenants. He was asked to whom he let them; he said, he let them by a written instrument. Parol evidence was not admissible to prove that fact, for that would be to let in parol proof of the contents of the written instrument. This case is perfectly different from the case of *Rex v. The Holy Trinity, Hull*. There the tenancy was proved by occupation and payment of rent. That was prima facie evidence of tenancy. Here the parol evidence was adduced to negative the presumption of tenancy arising from occupation and payment of rent.

*PARKE, J.* The substance of the case is, that the pauper occupied and paid taxes in respect of a tenement of the yearly value of 10*l.* The respondents, in answer to that, attempted to show that some other persons contracted jointly with the pauper to hold the premises, though the pauper alone occupied them. That fact alone must be proved by the contract, which was in writing.

Order of sessions quashed.

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### The KING v. The Inhabitants of CROWLAND, in the Parts of HOLLAND, in the County of LINCOLN.—p. 711.

By an act of parliament, passed for draining certain fen-lands, 5000 acres of the said fen-lands were vested in certain trustees as a recompense to the undertakers; and it was enacted, that all the inhabitants that might be thereafter upon any part of the lands so allotted to the trustees, and were not able to maintain themselves, should be maintained by the said trustees, their heirs, &c., and never become chargeable to all or any of the respective parishes wherein such inhabitants should reside: Held, that the lands so vested in the trustees were not thereby made extra-parochial, and that a party, by hiring and service on those lands, gained a settlement either in the parish where that part of the allotted lands where the service was performed was situate, or in the allotted lands themselves, which, for this purpose, were to be considered an incorporated district.

UPON an appeal against an order of two justices, whereby Ruth Reed and her two legitimate children were removed from the parish of Spalding, in the parts of Holland and county of Lincoln, to the parish of Crowland, in the same parts and county; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The respondents (the parish of Spalding) having proved that Reed, the husband of the pauper, gained a settlement in 1806, by hiring and service in the parish of Crowland, the appellants (the parish of Crowland), for the purpose of showing a settlement in Deeping Fen, proved that Reed, the husband, served under a yearly hiring with one William Patchett, of Deeping Fen, from 1807 to 1808, and continued that service until 1809, in which latter year he was married to Ruth, the pauper; that the said William Patchett during the time of such service was resident upon a part of Deeping Fen, and which is more particularly mentioned in a certain act of parliament of the 16 & 17 of Car. 2, for the draining of certain fens in Lincolnshire, as consisting of 5000 acres, and described in the said act of parliament as being set apart for an additional recompense to certain trustees therein named, over and above a third part of the said fens before assigned to one Thomas Lovell, and vested under the provisions of the said act of parliament in the said trustees therein mentioned, their heirs and assigns, in consideration of certain burthens and charges imposed upon the said trustees, their heirs and assigns, by the said act of parliament; that although at the present time there are no overseers for Deeping Fen, yet, nevertheless, that overseers were appointed for that place at intervals, but not regularly from the year 1790 to the year 1810, since which time no overseers have been appointed; and that until within the last eight or nine years a workhouse was kept and maintained in the said Deeping Fen, for the residence and management of the paupers living in the said fen. Upon this evidence, the court of quarter sessions confirmed the order of removal to Crowland, subject to the opinion of this Court upon the above facts, and directed that the said act of parliament should be considered as part of the case.(a)

(a) The act was entitled "An act for draining of the fen called Deeping Fen, and other fens therein mentioned;" and after reciting, "that in the 41 & 42 Eliz. one Thomas Lovell had undertaken to drain Deeping Fen and other fens; that one third part of the fen-lands had been allotted and decreed to him, as a recompense for so doing, by the commissioners of sewers; that the said decree had been ratified and confirmed by an act of parliament passed in the reign of James I.; that the said third part was by the said act ordained to be held by Lovell, his heirs and assigns; that he entered and became possessed thereof; that by some neglect in maintaining the banks, rivers, and sewers, the fens were returned to their ancient condition," enacted that the said decrees and acts of parliament should be repealed. It then further recited, that the assigns of Lovell had not fully effected the works, and alleged for reason, that the allotments were not a sufficient recompense to answer the charge of a more perfect performance of the said work, and enacted that the persons therein named, their heirs and assigns, should be declared to be the undertakers for the draining of the said fens, and every of them, in trust for the purposes therein mentioned.

By the fourteenth section it was further enacted, that the said trustees, their heirs and assigns, or the survivor of them, their or any of their tenants, farmers, or groundholders of any part of the said third part, or of the said fen, or of the said 5000 acres, should not have, or at any time thereafter, use, or claim any common of pasture or other commonage of pasturing in any part of the remainder of the said fens, nor any of them, nor in the North Fen of Pinchbeck and Spalding, nor any part thereof, by virtue or pretence of his or their reiance there; but all and every the inhabitants that might thereafter be upon any part of the said third part, or upon any part of the said 5000 acres, and were not able to maintain themselves, should be maintained and kept by the said trustees, their heirs and assigns, and the survivor of them, and never become chargeable in any kind to all or any the respective parishes wherein such inhabitant or

*M'Dowell* in support of the order of sessions. The pauper having once gained a settlement in Crowland, was properly removed to that parish, unless he acquired a settlement by hiring and service in Deeping Fen. That was an extra-parochial place: it had no overseer since 1790. The pauper, therefore, could not be removed thither. The fourteenth section of the local act throws the burden of maintaining poor persons residing on the 5000 acres on the trustees therein named. It does not appear that the place where the pauper served was a parish, town, or vill. The place, therefore, where he was last legally settled was Crowland.

*Bolland and Burnaby*, contra. The facts stated in the case are not sufficient to show that the place in which the pauper served is extra-parochial. The statute says that the inhabitants shall not become a burden to the parishes in which they reside. The presumption is that the whole of the 5000 acres were situated in some parishes. The place, therefore, where the pauper served must have been in some one of those parishes; and, if that be so, he gained a settlement in that parish. In *Rex v. Saughton on the Hill*, 2 B. & A. 162, Gloverstone, which was the last place in which the pauper had been legally settled, had, at the time when the order of removal was made, ceased altogether to be a township capable of maintaining its own poor, and yet it was held that the pauper could not be removed from a third parish to Saughton on the Hill, where he was settled, before he gained a settlement in Gloverstone. Here Crowland was not the last place where the pauper was legally settled. He gained a settlement either in the parish in which the part of Deeping Fen, in which he served, was situate, or, if that was a vill or township maintaining its own poor, then in that vill or township. It is true that there had not been any overseer appointed for several years. But if it be a vill or township, so as to admit of overseers, the parish of Spalding might have applied to the magistrates to appoint them, and then made their order. The place where the hiring and service were had and performed, was either part of some one of the parishes referred to in the fourteenth section, or was a vill or township capable of maintaining its own poor, and in either case the settlement in Crowland was superseded.

BAYLEY, J. It seems to me that in this case the removal to Crowland cannot be supported. It appears that the pauper, who was residing in Spalding, had acquired a settlement in Crowland. But if Crowland was not bound to maintain him, the order of removal is bad. There is nothing in the act of parliament to show that Deeping Fen is extra-parochial; and the presumption is, that, before the enclosure, it was in some parish. The provision relied upon in support of the order of sessions, is "that all and every the inhabitants that may hereafter be upon any part of the said third part, or upon any part of the said 5000 acres, and are not able to maintain themselves, shall be maintained and kept by the trustees, &c., and never become chargeable in any kind to all or any the respective parishes wherein such inhabitant or inhabitants shall reside or dwell." The fair construction of that clause seems to me to be, that if

inhabitants should reside or dwell; any statute or law to the contrary thereof in anywise notwithstanding."

By a subsequent section, in consideration of the sums expended in and about draining the fens, and of doing the work hereafter to be done, the trustees, their heirs, &c., were to have in fee-simple the third part of all the fens formerly assigned to Lovell, &c., as also 3500 acres added and allotted by a decree of sewers, and 1000 acres out of that part of the fens formerly taken in for the queen's improvement, and 5000 acres more, to be taken proportionally out of the fens of Kesteven and Holland, next adjoining to the 3500 acres, upon the trusts thereafter mentioned.



a party does or has done in the 5000 acres an act which would give him a settlement in a parish, he shall be no longer maintained by the parish, but that the obligation of maintaining him is cast on the trustees. The land allotted is made, for this purpose, an incorporated district. The true construction of the clause is, not that it prevents a settlement from being obtained, nor that it prevents a person from doing that which will supersede a former settlement gained elsewhere, but that the burden of maintaining the poor, instead of being thrown on the whole parish, is thrown on that particular part. I am of opinion, that in this case the order of removal to Crowland was bad, because a settlement was obtained in Deeping Fen.

LITLEDALE, J. Generally speaking, every place is to be deemed part of a parish until the contrary be shown. It ought, therefore, to be shown, from the words of this act, that the 5000 acres are not of a parish. That not being shown, they must be taken to be part of a parish. If so, then the pauper gained a settlement in that parish of which the part of the 5000 acres in which this service was performed was parcel. The settlement in Crowland was thereby superseded. The case might be different if the 5000 acres were an extra parochial place; because, in that case, a settlement could not have been gained there, and a pauper could not be removed thither. It may be another question, Whether the obligation on the trustees can be enforced? It is sufficient, however, to say, that the order of removal cannot be supported.

PARKE, J. When the facts are understood, it is a very plain case. The question is, Whether the order of removal from Spalding to Crowland can be supported? If the pauper had subsequently obtained a legal right to be maintained in some other place, then it cannot be supported. Here it is clear, that he either had a legal right to be maintained by the parish of which that part of the 5000 acres in which the service was performed was parcel, or by the trustees named in the act of parliament. It is unnecessary to decide whether the parish or the trustees were bound to maintain him: either will do. It is sufficient, in order to decide the present case that the pauper had a right to be maintained by the parish or by the trustees. That being so, the order of removal cannot be supported.

Order of sessions quashed.

DOE, on the demise of THOMPSON and Others, v. CLARK. — p. 717.

A cottage, standing in the corner of a meadow, (belonging to the lord of a manor,) but separated from it and from a high road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told that if he were allowed to resume possession it would only be during pleasure. He did resume and keep possession for fifteen years more, and never paid any rent: Held, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord.

EJECTMENT by the lessors of the plaintiff, and devisees and mortgagees of John Blackburn, deceased, who had been the owner of an estate in the parish of Bradley, and lord of the manor of Bradley.

At the trial before *Park, J.*, at the Summer assizes for the county of Hants, 1828, it appeared that the action was brought to recover possession of a cottage, which stood in the corner of a meadow next adjoining the high road in the village of Bradley, in the county of Hants. A hedge and high bank separated the cottage from the meadow. There was no waste in the village, but there was waste at the extremity of the manor. The land on both sides of the road belonged to the lessors of the plaintiff. It appeared that the cottage had been occupied first by one Weston, fifty-four years ago, and afterwards by one James Phillips; the latter occupied it forty years, till his death, at the age of eighty, in 1827, when it was sold by his son to the defendant. One Holloway, who had been gamekeeper to Edward Blackburn in his manor of Bradley, was called as a witness; he proved that in 1813 he went with the Rev. Henry Blackburn, who was the clergyman of the parish of Bradley, and brother of E. Blackburn, the then owner of the estate, to Phillips's house; that H. Blackburn told Phillips and his wife, that he, on behalf of his brother, had come to take possession of the house, and desired them to get another cottage as soon as they could, as his (H. Blackburn's) brother wished to pull it down. Phillips's wife, in the presence of her husband, said, she had as much right to be there as Mr. Blackburn, for they had never paid any rent. H. Blackburn told them it would be better for them to give up quiet possession. The husband said to his wife, "It is of no use making a piece of work; we had better go out at once." Phillips and his wife then went out into the road, without the garden-gate, and were asked for the fastenings or keys; they said they were in the habit of fastening their house only in the inside. Phillips was then asked if there was not a fastening; he said there was a chain, which Holloway looked for, but did not find. Holloway then went to his cottage, forty yards off, for a chain, and left H. Blackburn and the others in the road. He brought a chain, put it round the wicket, and locked it. H. Blackburn and Holloway then went into the house, where they remained a few minutes, and then unlocked and locked the gate. H. Blackburn then told Phillips and his wife, "If he let them in again, it would be during his brother's pleasure;" and then delivered the key to Phillips. It appeared, further, that Phillips never paid any rent afterwards. Witnesses were called on the part of the defendant to impugn the evidence of Holloway. The learned Judge told the jury, that an uninterrupted possession of land for twenty years was conclusive of the right in ejectment; but that, if during the twenty years the party in possession had made any acknowledgment that he occupied by the permission of another, that occupation was to be deemed permissive, and not adverse; that the payment of rent during the twenty years was conclusive evidence, that he occupied with

the permission of that person to whom he had paid it. If the occupier make such acknowledgment, otherwise than by the payment of rent, it was evidence that he held by permission of another. The learned Judge then told the jury to consider whether they believed the evidence of Holloway; and, if they did, then, whether Phillips did not, in 1813, acknowledge that he occupied the cottage by permission of E. Blackburn. If they believed the evidence of Holloway, the lessors of the plaintiff were entitled to the verdict. The jury having found for the plaintiff, a rule nisi for a new trial was obtained, against which

*Selwyn* and *Follett* showed cause. The case of *Doe v. Wilkinson*, 3 B. & C. 413, is precisely in point. The defendant there had enclosed a small piece of waste land by the side of a public highway, and occupied it for thirty years without paying any rent. At the expiration of that time he paid, on three several occasions, 6d. rent; and it was held that that, in the absence of other evidence, was conclusive to show that the occupation of the defendant began by permission, and entitled the plaintiff to a verdict. In this case the circumstance of Phillips, in 1813, having given up the possession to the agent of Edward Blackburn, was evidently an acknowledgment that the premises had been occupied by the permission of the owner of the estate.

*Mereuether*, Serjt., and *Greenwood*, contra. The authorities undoubtedly establish that where the facts are such as to show that the relation of landlord and tenant exists between the parties, the possession is not adverse. In *Doe v. Wilkinson*, 3 B. & C. 413, the house was built upon the waste. The defendant had occupied during thirty years, but during that time no rent was paid. It was afterwards demanded and paid on three several occasions. The payment of rent was an acknowledgment that the defendant held as tenant to the person to whom he paid rent. That was conclusive evidence to show that the commencement of the occupation was by the permission of the person to whom he paid the rent. In this case no rent was ever paid by the defendant; and there was no proof that the cottage was built on the waste of the manor. The plaintiffs produced no title-deeds to show that the land on which the cottage was built was the property of Blackburn. It appeared that Weston occupied fifty-four years ago; Phillips succeeded him, and continued in possession forty-two years. There was no interruption of the possession except for a few minutes. [*Bayley*, J. H. Blackburn, in 1813, came to the cottage, and, on behalf of his brother, demanded possession, and Phillips then reluctantly gave up the possession.] That was not a recognition by Phillips that he held as tenant of Blackburn; and no evidence of Blackburn's title was given. Unless the Court come to the conclusion that in 1813, Phillips intended to admit that the cottage was the property of Blackburn, there is no pretence for saying that the latter is entitled to recover.

BAYLEY, J. I think that the rule for a new trial ought to be discharged. There was no evidence to show under what circumstances the cottage was built. It may have been built by, and afterwards occupied adversely to the former lord of the manor; or it may have been built and afterwards occupied by Phillips, by the permission of the lord. There must be an adverse possession for twenty years to give title. Phillips was eighty years of age when he died; he probably knew under what circumstances he occupied the cottage, and whether he lived there by the permission of Blackburn. Now, Phillips, while living there in 1813, did an act which was evidence of an acknowledgment by him that he occupied by the

permission of the then owner of the estate. The question is, Whether the jury were warranted in concluding from that act, that he did occupy by such permission. It appeared that E. Blackburn, under whom the lessors of the plaintiff derived title, then claimed the cottage, and that his claim was reluctantly acquiesced in by Phillips and his wife, for they surrendered the possession to him. H. Blackburn then told Phillips that he should come there in future only by the permission of his brother E. Blackburn, and Phillips was let into possession on those terms. It was a question for the jury, under those circumstances, to say, whether he remained in the cottage by adverse title, or by the permission of Blackburn. There certainly was not in this case any payment of rent; the case, therefore, may not be so strong as that of *Doe v. Wilkinson*, 3 B. & C. 413. But there was a case for the consideration of the jury. If Phillips, in 1813, had refused to give up possession, and an ejectment had been brought, it is possible that the then owner of the estate might have been able to prove by witnesses that Weston and Phillips came into the possession of, and occupied the cottage by permission. I cannot say the jury came to a wrong conclusion, and, therefore, think that the verdict ought not to be disturbed. This rule must, therefore, be discharged.

LITTLEDALE and PARKE, Js., concurred.

Rule discharged.

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MORLAND and Another, Assignees of DICKINS and WARWICK, Bankrupts, v. PELLATT.—p. 722.

Judgment was entered up on a warrant of attorney given by two joint-traders, and a *fi. fa.* issued, returnable on the 2d of May. On the 1st of that month the sheriff's officer received from the defendants the money directed to be levied. On the 2d of May one of them committed an act of bankruptcy, and the other on the 5th. On the 11th a commission of bankrupt issued, and on the 19th the sheriff paid over the money to the execution-creditor. In an action by the assignees: Held, that he was entitled to retain it, not being creditor having a security at the time of the bankruptcy.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before *Park, J.*, at the Devonshire Summer Assizes, 1828, it appeared that in August, 1826, the bankrupts were indebted to the defendant in the sum of 218*l.*, for which he caused them to be arrested. They, thereupon, gave him a warrant of attorney for the amount, which was duly filed, and judgment was entered up on the 5th of March, 1827, and a *fi. fa.* issued against the bankrupts, returnable on the 2d of May. The goods of the bankrupts were seized on the 7th of March, but not sold, they making payments to the officer of the sheriff from time to time; and on the 1st of May they paid him the balance of the sum directed to be levied. On the 2d of May the officer paid over the money to the under-sheriff, but he refused to pay it to the defendant Pellatt without an indemnity. On the 11th of May an indemnity was given, and on the 19th the money was paid over. An act of bankruptcy was committed by Warwick on the 2d of May, and by Dickins on the 5th. On the 12th a commission of bankrupt was issued against them, under which the plaintiffs were duly chosen assignees. The learned Judge thought, that, under these circumstances, the plaintiffs were entitled to recover by virtue of the 6 G. 4, c. 16, s. 108, inasmuch as the money was not paid over to the defendant until after the bankruptcy of Warwick and Dickins. The plaintiffs, under this direction, having obtained a verdict, a rule nisi for a new trial was granted in Michaelmas term, against which

*Rogers* (with whom was *Wilde*, Serjt.) showed cause. According to the decision in *Notley v. Buck*, 8 B. & C. 160, the plaintiffs were entitled to recover. The money was not paid over by the sheriff until the 19th of May; but before that time a commission had issued against Warwick and Dickins; the sheriff, therefore, had no right to pay over the money, and the present defendant, having received money which belongs to the estate of the bankrupts, is liable to an action for money had and received to the use of the assignees. [*Littledale*, J. When the sheriff received the money, he became liable to an action for money had and received by the plaintiff in that suit.] In *Notley v. Buck* the seizure was before the bankruptcy, and thereby the property was changed, *Clerk v. Withers*, 1 Salk. 322, 2 Bac. Abr. Exec. (M), and yet the sheriff was held liable to the assignees. [*Bayley*, J. The property is not changed by the seizure, but the sale.] Then it is in the power of the sheriff, by selling or abstaining from doing so, to give the property to either party at his pleasure. But notwithstanding the seizure and sale, the present defendant continued a creditor of the bankrupts. In *Dalton's Sheriff*, 179, it is said, "If the sheriff upon a fi. fa. shall execute the writ, and levy the debt, but shall neither return the writ, nor pay the money to the plaintiff, yet the first levying of the debt was lawful, &c. Secondly, the plaintiff may have a new execution against the defendant, and the defendant is left to his action against the sheriff." But suppose the present defendant, not having received the money, had sued the sheriff for it in the manner suggested, he could not have made out his title but through the medium of the judgment and execution; he would, therefore, have been availing himself of the execution, which is contrary to the very words of the statute 6 G. 4, c. 16, s. 108. If, then, the present defendant could not have recovered the money, the sheriff had no right to pay it him, and the money, notwithstanding such payment, belongs to the assignees of the bankrupt.

*C. F. Williams* and *Merewether*, Serjts., contra. The money directed to be levied was paid to the officer on the 1st of May, and by him to the sheriff on the 2d. As soon as the payment was made to the officer, it was money had and received to the use of the plaintiff in that suit: *Dale v. Birch*, 3 Campb. 346. [*Littledale*, J. That was after a return had been made.] Here the writ was returnable on the 2d of May, before Dickins committed an act of bankruptcy. The right of Pellatt to the money was then complete, and he no longer had any claim upon the bankrupt. The case is, therefore, not to be distinguished from *Wymer v. Kemble*, 6 B. & C. 479.

*BAYLEY*, J. I entertain no doubt upon this question. The statute 6 G. 4, c. 16, s. 108, under certain circumstances takes away the rights of creditors having security at the time when the debtor becomes bankrupt. If it can be said that Pellatt was a creditor of the bankrupts at the time when the bankruptcy occurred, then I think he comes within the clause in question. If, however, he was not then a creditor, but something had intervened which destroyed the debt, I think that the statute is inapplicable. Now the plaintiffs sue under a joint commission, and must take out a title as assignees of both the bankrupts, existing at the time to which they must refer. Their title was not complete until the 5th of May, and before that time the writ issued by Pellatt was returnable, and the sheriff had received under it the whole sum necessary to satisfy the debt. It is said that the sheriff was bound to keep the money until the return of the writ. We need not decide that, for here it was the duty of the sheriff to bring the money into court on the 2d of May, to be paid to the execution

creditor. He did not do so; but his neglect of duty cannot vary the rights of the parties; and if he had done his duty Pellatt would clearly on that day have ceased to be a creditor of the bankrupts. But without any actual payment of the money to the creditor, I think that the seizure of the debtor's goods, and the conversion of them into money, extinguishes the debt. The old cases say that a levy under a fieri facias discharges the original debt. The only cases since the statute in question are *Wymer v. Kemble*, and *Notley v. Buck*. In the former, the goods of the debtor had been seized under a fieri facias, and delivered to the creditor under a bill of sale by the sheriff; then a bankruptcy followed, and it was held that he had ceased to be a creditor. *Notley v. Buck* was different; there the sheriff had made a seizure before the act of bankruptcy, but the goods remained in his hands unsold at the time of the bankruptcy, and it was held that the sheriff could not pay over to the creditor money received by him after the bankruptcy. After seizure, and before sale, the sheriff has a special property in the goods, but the debtor has the general property; up to that time, therefore, the debt is not extinguished, and the judgment creditor has a security for his debt. But after sale, or payment of the money, the sheriff becomes the debtor, and the original debt is extinguished. In this case, therefore, I am of opinion that the defendant was not a creditor at the time of the bankruptcy, and consequently was not within the statute. He has then a right to retain the money paid to him by the sheriff, and the rule for a new trial must be made absolute.

LITLEDALE, J. I think the defendant was entitled to have a verdict in his favour. But for the proviso in the 108th section there could have been no doubt, for the seizure was before the bankruptcy; and as between a creditor and assignees it has always been held that an execution is executed by seizure, it being an entire thing, which, when once begun, must go on to a conclusion, and cannot be stopped by an act of bankruptcy. But the proviso says that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors. Now that cannot be meant to apply to all persons who ever have been creditors of the bankrupt, and the Court have held it to be confined to creditors having security as mentioned at the beginning of the section. A creditor may be considered as having security by a judgment or a seizure under a fi. fa. But had he security in this case? The act of bankruptcy by one of the partners was not until the 5th of May. The whole of the money was paid to the sheriff's officer on the 1st of May, before an act of bankruptcy by either partner, and on the 2d it was the duty of the sheriff to return the writ, and pay over the money. From that time Pellatt ceased to be a creditor having security. But I am disposed to go still further, and to say that the sheriff was liable to an action for money had and received at the suit of the creditor as soon as it was paid, and before the return of the writ.

PARKE, J. I think it clear that the latter part of the 108th section cannot deprive any execution-creditor of his remedy, unless he is a creditor having security at the time of the bankruptcy, and then seeking to avail himself of the execution to the prejudice of other fair creditors. It appears to me that Pellatt was not a creditor of the bankrupts at the time of their bankruptcy, for, according to the case of *Perkinson v. Gilford*, Cro. Car. 539, at all events on the 2d of May the sheriff was substituted for them as the debtor, although it may be doubtful whether an action would lie against him before the return-day of the writ. Here,

however, the title of Pellatt against the sheriff was perfect before that of the present plaintiffs arose. In *Clerk v. Withers*, as reported by Lord *Raymond*, 1072, Lord *Holt* says, that the levy is an answer to an action of debt or scire facias on the judgment, and he refers to *Atkinson v. Atkinson*, Cro. Eliz. 890; but there the money had been paid to the sheriff. That point, therefore, may be somewhat doubtful, but where the money has been paid to the sheriff there can be no doubt. Pellatt, therefore, at the time of the bankruptcy, was no longer a creditor of the bankrupt. Then is he seeking to avail himself of the execution? It is said that he is, because he cannot sue the sheriff without proving it. Supposing that to be so, he is using it against the sheriff, and not to the prejudice of other fair creditors of the bankrupt. Such an use of the execution is not prohibited. In any view of the case, therefore, the verdict found for the plaintiffs is wrong, and there ought to be a new trial.

Rule absolute.

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W. THOMAS v. WILLIAM COOK. — p. 728.

Where A., at the request of B., entered into a bond with him and C. to indemnify D. against certain debts due from C. and D., and B. promised to save A. harmless from all loss by reason of the bond: Held, that this promise was binding, although not in writing, and that A. might recover from B. the whole of the moneys which he was compelled to pay by virtue of the bond.

**ASSUMPSIT.** The declaration stated that on, &c., a certain partnership in trade between one W. Cook, since deceased, and one N. D. Morris, was dissolved; that it was agreed between W. Cook, since deceased, and Morris, that the former should take upon himself the payment of certain debts, (specified in the declaration;) and that it was also agreed that a bond of indemnity, executed by W. Cook, since deceased, and two other persons, should be given to Morris, to save him harmless from the payment of the said debts. And thereupon afterwards, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant, would, together with the defendant and W. Cook, since deceased, execute a bond of indemnity to Morris in the sum of 4100*l.* conditioned to save him harmless from the said debts, the defendant undertook and promised the plaintiff that he, the defendant, would save harmless and indemnify him from all payments, damages, costs, and expenses which he (plaintiff) should or might incur, bear, pay, sustain, or be put unto by reason or means of his so executing the said writing obligatory. Averment, that plaintiff was afterwards compelled to pay on account of the said debts the sum of 360*l.*, and that defendant had not indemnified him. The second and third counts were in substance the same. The fourth count alleged, that in consideration that the plaintiff, at the request of the defendant, would, as surety for W. Cook, since deceased, together with the said W. Cook and the defendant, make and draw a certain bill of exchange for 500*l.* upon certain persons, (named,) and would indorse and deliver the same to Morris, in order that he might negotiate the same for his own use, the defendant undertook to indemnify the plaintiff from any loss or damage by reason of his drawing and indorsing the bill. Averment, that plaintiff did draw and indorse the bill in manner aforesaid, and was afterwards by reason thereof compelled to pay it, whereof the defendant had notice, but did not indemnify him. Counts for money lent, paid, had, and received, and on an account stated. Plea, the general issue and statute of limita-

tions. Replication, that defendant promised within six years. At the trial, before *Park, J.*, at the Hereford Lent assizes, 1828, it appeared that the plaintiff and defendant had executed the bond, and drawn the bill mentioned in the declaration; that the defendant had requested the plaintiff to do so, and promised that he should not be a loser. It was also proved, that on account of payments made by the plaintiff towards the debts specified, and the bill of exchange, a sum of 400*l.* remained due to him in 1825. A promissory note for that sum given by *W. Cook*, since deceased, to the plaintiff, and bearing date in the year 1823, was then produced to the defendant, and he signed it, and altered the word *I*, at the beginning, to *We*. After this time the plaintiff received from the estate of *W. Cook*, since deceased, 100*l.*, leaving a deficiency of 300*l.* Several acknowledgments of a debt by the defendant within six years were proved. For the defendant it was contended, that the note was void on account of the alteration, and that the plaintiff could not recover on the special counts for want of a written agreement, the promise there laid being to answer for the debt of a third person, and consequently that he could only recover against the defendant as co-surety on the count for money paid, one moiety of the 300*l.* The learned Judge directed the jury to find a verdict for the plaintiff for 300*l.*, and gave the defendant leave to move to reduce it to 150*l.* A rule nisi for that purpose was obtained in last Easter term, against which

*Taunton and Chilton* now showed cause. It is true that the promissory note was rendered invalid by the alteration; but although void as a note, it might be received in evidence as a declaration by the party signing it that the money was due, *Rez v. Pendleton*, 15 East, 449, *Dover v. Maestaer*, 5 Esp. 92. [*Bayley, J.* You endeavour to use the instrument as a contract, which is contrary to the provisions of the stamp-act.] Even without the note, the plaintiff is entitled to retain the verdict for 300*l.* There was evidence of an antecedent promise by the defendant to refund all that the plaintiff should be compelled to pay. Such a promise is not within the fourth section of the statute of frauds, and need not be in writing. To be within that clause, the promise must be made to a creditor. Here the plaintiff, at the time when the promise was made, was not a creditor. If one bail procures another person to join him by giving a promise of indemnity, that need not be in writing. In some cases, where there was an original consideration, it was held that a promise, although made to pay a creditor of a third person, need not be in writing, *Williams v. Leaper*, 2 Wils. 808, 3 Burr. 1886, recognized by Lord *Eldon* in *Houlditch v. Milne*, 3 Esp. 86, and by Lord *Ellenborough* in *Castling v. Aubert*, 2 East, 325.

*Russell, Serjt.*, and *Curwood*, contra. The declaration itself describes the debts paid by the plaintiff as the debts of *W. Cooke*, deceased, and *Morris*—and the promise alleged to have been made by the defendant is to indemnify the plaintiff if he is called upon to pay those debts; or, in other words, to pay those debts if the original debtors did not. That is expressly within the words of the fourth section of the statute of frauds, which requires all special promises to answer for the debt, default, or mis-carriage of another person to be in writing. It is said that the plaintiff was not a creditor at the time when the promise was made; but the cases of *Jones v. Cooper*, Cowper, 227, and *Matson v. Wharam*, 2 T. R. 80, show that the debt need not exist at the time to be within the statute.



[*Bayley, J.* This in reality was not a promise to pay the debt of a third person, but to indemnify.] That is true, but it was to indemnify against the debt of a third person.

*BAYLEY, J.* It is provided by the fourth section of the statute of frauds, that "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized." Here the bond was given to *Morris* as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for *W. Cook*, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds; and if so, there was sufficient evidence to entitle the plaintiff to a verdict for 300*l*.

*PARKE, J. (a)* This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same. The rule for reducing the verdict ought, therefore, to be discharged.

Rule discharged.

(a) *Littledale, J.*, was at the Old Bailey.

## The KING v. The Inhabitants of MATTISHALL.—p. 733.

Before the execution of an indenture, the master said that the intended apprentice should have better clothes. The apprentice then applied to the parish officers, who agreed to give him 2*l.* on the execution of the indenture, for the purpose of buying clothes, which they did accordingly: Held, that the money paid by the parish officers was an expense incurred by reason of an indenture of apprenticeship, within the meaning of the 56 G. 3, c. 139, s. 11, and, therefore, that the indenture required the assent of two justices.

UPON an appeal against an order of two justices, whereby J. Taylor, and Anne, his wife, were removed from the hamlet of Heigham, in Norwich, in the county of Norfolk, to the parish of Mattishall, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Jeremiah Taylor, on the Sunday fortnight before the Christmas, 1820, when he was living at Mattishall with his father and mother, was informed by a person named Hudson, that Joseph Middleton, who was a blacksmith, living at Wymondham, wanted a lad. J. Taylor went to Middleton's the next day, when they agreed that Taylor should go on the Tuesday following, and should stay a month upon liking, and if they liked each other, that he should be apprenticed to him for three years. Taylor went to Middleton's on the Tuesday following, and continued with him for a month. At the expiration of the month the indenture was executed. It was for three years; it was signed by the master, and attested by the parish officers; but it was not approved of by two justices. Taylor served under the indenture for three years, living during all that time with Middleton. Middleton, before the indenture was executed, said the pauper should have some better clothes, and the pauper thereupon applied to the parish officers of Mattishall. The parish officers, who are the attesting witnesses to the indenture, agreed to give him 2*l.* at the execution of the indenture, to buy clothes; and 2*l.* more for the same purpose at the end of a year. They gave the first 2*l.* to the pauper's mistress, who laid it out for him in the purchase of clothes. At the end of the year the other 2*l.* were paid to the pauper.

*Kelly* in support of the order of sessions. The indenture of apprenticeship was void by reason of its not having been approved of by two justices. The money advanced by the parish officers was not a premium within the meaning of the preamble of the eleventh section of the statute 56 G. 3, c. 139, but it was an expense incurred by reason of the indenture, and is, therefore, within the very words of the enacting part of that section. It is also within the mischief contemplated by the legislature, which was, that parish officers clandestinely advanced money for the purpose of binding out poor children, without becoming binding parties to the indenture, and thereby rendered the assent of two justices unnecessary. The object of the legislature was, that wherever the parish officers interfered, by advancing any money, the binding should be subject to the approbation of two justices.

*Chitty* and *Biggs Andrews*, contra. The sessions have not found that the money was paid out of the parish funds, and that fact ought not to be assumed. *Rex v. Arundel*, M. & S. 257, shows, that, before the statute 56 G. 3, c. 139, though the apprentice were a pauper in the parish work-house at the time of the binding, and the parish officers paid the premium, yet if the apprentice were not a parish apprentice, within the meaning of the 43 Eliz. c. 2, the assent of two justices was not necessary. The 56

G. 3, c. 139, only applies to cases over which the parish officers have a control in consequence of their providing the premium.

BAYLEY, J. It seems to me that the order of sessions is right. The enacting part of the eleventh section of the 56 G. 3, c. 139, goes beyond the recital. If it had not, I could not have said that the money was paid as a premium. But the master, before the execution of the indenture, requires that the boy should have better clothes, and the pauper then applied to the parish officers, and they supplied him with 2*l.*, and agreed to give him 2*l.* more. It has been said, that it does not appear that the money was paid out of the parish funds. If that was not so, it might easily have been proved. The sessions have found that it was paid by the parish officers. That *prima facie* implies, that it was paid by them out of funds belonging to them in that character. We may assume, therefore, that the sessions had premises whereupon to find, that the money was contributed by the parish officers, not out of their private funds, but out of the parish funds. If the fact be so, then we must look to the words of the statute 56 G. 3, c. 139, s. 11. It recites that the salutary provisions of the 43 Eliz. are frequently evaded in the binding out *poor* children apprentices, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of justices of the peace; and then enacts, "that no indenture of apprenticeship, by reason of which *any expense whatever* shall at any time be incurred by the public parochial fund, shall be valid and effectual unless approved of by two justices, &c." Here the money was paid, because the master objected to taking the apprentice unless he had clothes. It was, therefore, an expense incurred by the parish, by reason of the indenture, within the very words of the act of parliament. The indenture ought, therefore, to have been approved by two justices. That not having been done, the indenture is void, and the service under it did not confer any settlement.

LITTLEDALE, J. We must assume from the language of the case, that the parish officers advanced the money out of funds belonging to them as parish officers. The sessions having come to that conclusion, this is a case within the words of the act of parliament.

PARKE, J. It is perfectly clear, that the money advanced to the pauper was an expense incurred by the public parochial funds, within the words of the enacting part of the eleventh section of the 56 G. 3, c. 139, though it was not advanced as a premium within the meaning of the recital. I think, also, that it is a case within the mischief contemplated by the legislature. By the statute 43 Eliz. c. 2, the assent of two justices was required in cases where the binding was by the parish officers. But if they secretly advanced the whole or part of the premium (provided they were not the binding parties), the assent of the justices was unnecessary. That was the mischief which it was the object to remedy. The statute 56 G. 3, c. 139, s. 11, requires the assent of the justices in all cases where the parish officers interfere in the binding out of poor children, by advancing money for that purpose. This is a case, therefore, falling within the mischief contemplated by the legislature.

Order of sessions confirmed.

## ROWE v. BRENTON. — p. 737.

Where the crown is interested the Attorney-General may, as a matter of right, demand a trial at bar.

Where in trover for copper ore it was proved that the plaintiff was in possession of land in which he sunk a shaft and raised the ore in question, and the same witness on cross-examination proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land when he sunk his shaft: Held, that this was prima facie evidence of the plaintiff's title to the ore, which must be left to the jury.

On account of the interest which the crown has in the duchy of Cornwall, all acts which affect the possessions or revenues of the duchy are to be considered as public acts; and, on this ground, a document purporting to be a caption of seisin taken to the use of the first Duke of Cornwall by certain persons assigned by his letters patent to do so, was received in evidence to show the rights of the Duke.

An ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its construction the directions of the stat. 4 Ed. 1, will be presumed to have been taken under competent authority, although the commission cannot be found.

The enrolment of a lease granted by the Duke of Cornwall is evidence, in the same manner as if it had been granted by the crown when there is no Duke of Cornwall.

Where in each of several manors belonging to the same lord, and part of the same district, it appeared that there was a class of tenants answering the same description, and to whom their tenements were granted by similar words: Held, that evidence of what rights had been enjoyed by those tenants in one manor, might be received to show what were their rights in another.

Answers to interrogatories may be read without producing the interrogatories, if they cannot be found.

**TROVER** for a quantity of copper ore. Plea, not guilty. In Hilary term, 7 & 8 G. 4, the Attorney and Solicitor General appeared, and suggested that the crown was interested in the result of this cause, and demanded a trial at bar as a matter of right, the Court not having power to grant a writ of nisi prius where the king is a party, or where the matter toucheth the right of the king, without a special warrant from the king or the assent of the king's attorney, 2 Inst. 424, Fitz. N. B. 241 a, tit. *Procedendo*. Upon this ground a trial at bar was granted.

In this term the cause came on for trial, when, on behalf of the plaintiff, it was proved that he was in possession of certain land called Lamellan, or Nansmellyn, in the manor of Tewington, in Cornwall, that he had sunk a shaft there and raised a quantity of copper ore, which was afterwards carried away from the premises by the defendant, who was a shareholder in the East Crumis mine, the shaft of which was sunk in land adjoining to plaintiff's. On the cross-examination of the plaintiff's witness, it appeared that the workings of the East Crumis mine extended under the plaintiff's land, and that they were actually working a lode of copper there, when the plaintiff sunk his shaft down to the same lode and brought up the ore in question. The plaintiff's counsel, although aware of the nature of the defence about to be set up, refused in the first instance to give any further evidence of title; and it was thereupon contended for the defendant, that the plaintiff had not established even a *prima facie* case. He had shown no title to the land beyond the presumption arising from the mere fact of possession, and although that might, *prima facie* extend to the minerals under the soil as well as to the surface, yet no such presumption could arise when it appeared that the defendant was in possession of and working the lode of copper.

Lord TENTERDEN, C. J. We all think that the Court cannot take upon itself to nonsuit the plaintiff. The evidence given must be left to the consideration of the jury.

The *Attorney General* then opened the case for the defendant, and stated that he claimed the ore in question as lessee under the crown in right of the duchy of Cornwall. That the plaintiff's land was a conventional tenement of the manor of Tewington, and that although such tenements were held to the tenants, their heirs and assigns, from seven years to seven years, renewable for ever, they were of a base tenure, and the tenants had no right to the minerals; that the same tenure pervaded the whole of the duchy manors, and that wherever copper had been worked under them, it was by virtue of leases from the Duke of Cornwall, or the king, when there was no Duke of Cornwall.

In support of this case the following evidence was given.

An extract from Domesday Book, showing that the king held various manors and possessions in Cornwall, three of the manors, Hellestone, Bewington (which was the same as Tewington), and Pennehyle, being ancient demesne.

Another extract which stated, that Rainald held of Earl Moreton, Treville, Tremetone, and Calestock.

A charter of the 15 H. 3, whereby he gave and granted to Richard, Earl of Poitou and Cornwall, the whole county of Cornwall, with the stannary of Cornwall, and *all mines* and other appurtenances of the same county and stannary aforesaid; to have and to hold of him, the said king, and of his heirs, to the same earl and his heirs, doing therefore to the said king and his heirs the service of five knights' fees, &c.

A commission issued, 2 Ed. 1, to certain escheators, directing them to enquire by good and lawful men (amongst other things), how many and what demesne manors the king hath in his hands in each county, as well of ancient demesne of the crown of escheats and perquisites. Also what manors were wont to be in the hands of the king's predecessors, and who now hold the same, and by what warrant, and from what time, and by whom, and how they have been alienated. The return for the hundred of Powdreshire stated, "That the manor of Tewington was heretofore ancient demesne of the crown of the lord the king, and King Henry, father of the lord the now king, gave the said manor to his brother, Earl of Cornwall, and it is worth 20*l*. Also the manors of Moreste and Tibeste, &c., were escheats of King Henry, father of the now king, by the death of Andrew de Vitri, and the same King Henry gave the said manors to Richard his brother, Earl of Cornwall, now forty years past and upwards. Also the late Robert de Cardinan held in chief of the lord the King Henry, father of the lord the now king, seventy-one fees, whereof the lord the Earl of Cornwall holds of the same fees Restormel, &c. All these are alienated by Isolda de Cardinan, and are worth 30*l*. now four years past. (Other parts of the inquisition and returns were read, by which it appeared, that Roger de Valletort gave to Earl Richard the castle of Trematon, the manor of Trematon, and the manor of Calestock).

Secondary evidence of an inquisition post mortem Edmundi Com. Cornub., was then given in the following manner. A copy of a coram rege roll of the 9 Ed. 2, was produced, and it appeared to be a proceeding in the nature of a petition of right by the heirs of Roger de Valletort, to recover from the crown the two manors of Trematon and Calestock. The proceeding originated in parliament, and was sent to this Court that the nature of the complaint might be inquired into. This Court sent a request to the Chancellor to certify to them two inquisitions taken, one on the death of Earl Richard, the other on the death of his son Edmund. The Chancellor answered that the former could not be

found, but the latter he certified under the seal of his court, and it is then set out on the record. This was admitted to be good secondary evidence, and the inquisition taken in the 29 Ed. 1, was read from that record, whereby it appeared that Edmund died seised in his demesne as of fee of the seventeen manors hereafter mentioned as assessionable manors, with the issues of mine of tin, &c., and that in each of the manors there were free tenants, conventional tenants, and villeins.

For the plaintiff it was contended, that the defendant had no right to give evidence of things relating to any manor except Tewington, of which it was admitted that the plaintiff's lands were parcel. But the Court held that the objection was premature, the effect of the present document merely being to show that in each manor there were persons called free tenants, conventional tenants, and villeins, without stating what were their rights in any of the manors; and as the point was afterwards discussed at length, the arguments upon it in this stage of the proceeding have been omitted.

A grant by Ed. 2, in the first year of his reign, to Piers de Gaveston, of the whole County of Cornwall, with the castles, towns, manors, &c., and also the stannary, and all mines of tin and lead which were of Edmund, late Earl of Cornwall, in the county aforesaid.

A grant by Ed. 2, in the third year of his reign, to Piers de Gaveston, and Margaret his wife, confirming the former grant.

A grant in the 11 Ed. 2, of the same premises to Isabella, Queen of England, to hold during the king's pleasure.

Charter of the 5 Ed. 3, granting to his brother, John of Eltham, the Earldom of Cornwall, and inter alia the seventeen manors in question, which were there enumerated.

Charter of the 11 Ed. 3, creating his son Edward Duke of Cornwall, and granting to him inter alia those seventeen manors, viz., "Launceston, Trematon, Tyntagel, Restormel, Clymneslonde, Tybeste, Tewington, Helleston in Kerrier, Moreste, Tewarnayle, (Tywarnhale,) Pengkneth, Penlyn, Rellaton, Elleston in Trighshire, Lyskyret, Calistock, Talskyde, and Lostwythiel, and our prisages and customs of wines, and all the profits of our ports in Cornwall, &c.; also our stannary in the same county, together with the coinage of the same stannary, and with all issues and profits therefrom arising, and also with the explees, profits, perquisites of court of stannary, and mines in the same county; to have and to hold to him and to the first-begotten sons of him and of his heirs kings of England, and dukes of the same place in the kingdom of England, hereditarily to succeed as is aforesaid; together with, &c., escheats and services of tenants as well free as native, and with all other things to the same castles, manors, and honours howsoever and wheresoever belonging or pertaining of us likewise and our heirs for ever as is aforesaid. All which same castles, &c., manors, &c., we do by our present charter for us and our heirs annex and unite to the aforesaid duchy, to remain to the same for ever, so that from the same duchy they may at no time be in anywise separated, nor may be in any manner soever given or granted by us or our heirs to any other person or persons than to the dukes of the said place; so also that on the aforesaid duke or other dukes of the same place being deceased, and the son or sons to whom the said duchy by force of our aforesaid grants is known to belong, not then appearing, the same duchy, with the castles, manors, &c., and all other things aforesaid, shall revert to us and our heirs kings of England, to be retained in the hands of us and the same our heirs kings of England, until such son or

sons hereditarily to succeed in the said kingdom of England shall appear as is aforesaid; to whom then for us and our heirs we do grant and will the same duchy, with the appurtenances to be delivered successively, to be holden as is above expressed, &c." At the end of the charter there was the following saving: "The king however willesh, that his dear and faithful Bartholomew de Burghuich William de Cusance, to whom the king hath granted the issues and profits of the castles and honours aforesaid until the feast of St. Michael next coming, in aid of the payment of the debts of John late Earl of Cornwall, shall be in no wise prejudiced concerning the perception of the aforesaid issues contrary to the aforesaid grant of the king."

Another charter of the same year, reciting the former, and granting to the Duke of Cornwall the return of writs in the places before named.

A third charter of the same year, reciting both the former, and granting and confirming to the Duke all fees in any way belonging to the said castles, manors, &c.

The account of the receiver, William de Cusance, for the year 11 Ed. 3, was then produced from the king's remembrancer's office (which was proved to be the proper depository for the minister's accounts of the king and the Duke of Cornwall.) It appeared to have been audited and allowed. This account stated, that no issues or profits of the manors, &c. in question, had been received after May, because Edward Duke of Cornwall had then taken seisin of them pursuant to the charter.

A document was then produced from the same office, purporting to be a caption of seisin to the use of the Duke of Cornwall, by James de Wodestocke and William de Monden, assigned by the letters patent of the Duke, to do the same on Monday, May 12, 11 Ed. 3. For the plaintiff it was objected, that this instrument could not be read in evidence. That it was not a public document, executed under any public authority, but a mere account of something done under a letter of attorney from the Duke of Cornwall. The Duke of Cornwall was merely a subject, although the highest in the kingdom: the public had no interest in his acts, nor any with respect to the revenues of the dukedom. His acts were, therefore, to be treated as those of any other subject, and consequently this instrument could not be used for the purpose of affecting the rights of third persons. It was introduced not merely to prove the fact of seisin having been taken, but to prove circumstances relating to the manors comprised in the grant from the crown.

For the defendant it was urged, that this was a public document relating to the property of the crown, inasmuch as it was the evidence of what had been alienated by Ed. 3, to the Duke of Cornwall.

Lord TENTERDEN, C. J. The foundation of this objection entirely fails. It has been argued that this instrument cannot be received in evidence, because it is a mere private document, the acts of the Duke of Cornwall, being only like those of any other subject. In general, that is true. But with regard to the duchy of Cornwall, the case is very different; for when there is no Duke of Cornwall, the possessions granted to him revert to the crown. The crown representing the public, has an interest in everything relating to the duchy of Cornwall and its revenues; and it is immaterial whether any act affecting them is done by the king when there is no Duke of Cornwall, or by the Duke of Cornwall when there is one. The instrument in question is, therefore, a document affecting the interests of the public, and must be received.

The caption of seisin of the manor of Tewington, was then read. It

first contained a list of the free-tenants. The first entry was as follows : —“ William de Bodrygan holds of the lord the Duke of Cornwall, in socage, seven Cornish acres of land in Tregrian, rendering, therefore, by the year, at the four usual terms of the year, in equal portions, 18s. 6d. And for fine of tin at the feast of St. Michael 14d., and doing suit at the court of the lord duke, from three weeks to three weeks.”

The other free tenants were then mentioned in like manner, the fine of tin always being a sum certain. Then followed the free conventionaries. “ Nicholas Wisa holds of the lord duke, in convention, one messuage, &c., which he took of the lord John, late earl of Cornwall, to hold in conventionary from the feast of St Michael, in the 7 Ed. 3, to the end of seven years thence next following, not completed. Rendering, therefore, by the year, at the four usual terms, 7s. 9d.; and at the feast of St. Michael a certain rent, called a fine of tin, and doing suit at the lord's court from three weeks to three weeks; and he shall be reeve, decennier, and beadle, when he shall be elected; and shall properly sustain the messuage aforesaid, shall manure the land with the whole stock, not making waste nor destruction; and when he shall die the lord shall have in the name of a heriot the beast which shall be of the greatest price, and he shall have nothing of his other chattels. And he hath done fealty, and claims to hold the tenements aforesaid, in free conventionary, by the aforesaid services, during the term aforesaid.” After several other free conventionaries, there was “ Philip de Nansmellyn holds of the lord duke one messuage eleven acres of land English, in half an acre of land Cornish in Nansmellyn, which he took of the aforesaid earl, to hold in convention for the time aforesaid, rendering therefore, by the year, at the four usual terms, 11s. and a fine of tin, and doing suit and all other services as the aforesaid Nicholas Wysa, and hath done fealty, and claimeth to hold those tenements in free convention by the aforesaid services, during the term aforesaid.”

Then followed similar entries as to

John de Nansmellyn;

Jordan de Nansmellyn; and

Gregory de Nansmellyn.

“ Native conventionaries.

“ Nicholas Pantener, a native, holds of the lord duke one messuage, &c., in Tyngaran, which he before took of the lord John, late Earl of Cornwall, to hold in native convention from the feast of St. Michael, 7 Ed. 3, to the end of seven years then next following, not completed; rendering therefore, by the year, at the four usual terms, 8s. and doing suit at the lord's court from three weeks to three weeks. And he shall be reeve, decennier, and beadle, when he shall be elected, and shall be taxed at the will of the lord; and when he shall die, the lord shall have all his chattels, and his latest born son whom he shall leave alive shall have his land by a fine to be made with the lord, at the same lord's will. And hath done fealty, and claimeth to hold those tenements by the aforesaid servile services in native convention, at the will of the lord, during the term aforesaid.”

Then followed several similar entries, and then

“ Natives of Stock.

“ Robert Ceron, a native of stock, holds of the lord duke in villeinage in Tyngaran, one messuage, five acres of land English, in, &c., rendering therefore by the year, at the four usual terms, 5s. 3d., and doing suit at the lord's court, &c. (as in the case of native conventionaries); and he



shall not be amoved from the land for his whole life, and he hath done fealty."

At the close of the document there was this entry: "Fines of tin of free conventionaries and natives at the feast of St. Michael, worth by the year 20s. Also toll of tin of Tewington is worth by the year 6s."

The caption of seisin of the other manors also contained free tenants, free conventionaries, native conventionaries, and natives of stock.

A minister's account for Tewington, 25 Ed. 1, was then read, containing an acknowledgment of 4s. of Passchals of Nansmellyn, a conventionary for this *that he may hold his land for the term of ten years as he before held*; this being the first year.

A document purporting to be an extent of the manor of Tewington, taken in the 1 Ed. 3, by Roger de Gildesburgh, was then produced from the lord treasurer's remembrancer's office. It was strung together with several others. The first (an extent of Tywarnhale) was described as being *per sacramentum*; in the title of the others those words were omitted. On the last there was indorsed, "Roger de Gildesburg, steward of the lord the king, of the lands of the king which were in Isabel Queen of England on this side Trent, by command of William de Norwich, treasurer, &c., delivers here these rolls the 27th of October, 5 Ed. 3, from the Conquest." Many extents found in that office have similar indorsements. It was proved that the lord treasurer's remembrancer's office is a proper depository for such documents, and that none are received there unless taken by due authority, but that some extents under the crown are deposited elsewhere. The document was not signed, nor did it contain within itself any statement of the authority by which it was taken; nor was any commission found. But the order in which the different descriptions of property were mentioned pursued the directions of the statute 4 Ed. 1.

For the plaintiff it was objected, that this could not be received in evidence, inasmuch as it did not appear either by any commission, or any internal evidence, by whom or under what authority the extent was taken. The indorsement merely explained the manner in which the rolls came into the remembrancer's office, and had no relation to the taking of the extents.

On the other hand it was argued that the statute 4 Ed. 1, made it the duty of the king's steward to take extents from time to time, and that the extent in question must have been taken in pursuance of the statute, as the various matters contained in it followed each other in the order set down in the statute. And further, that in the 1 Ed. 3, there was good reason for taking an extent of the lands, &c., granted to Queen Isabel, inasmuch as that grant expired on the death of Ed. 2.

LORD TENTERDEN, C. J. I am of opinion that this instrument must be received. It appears that by the statute 4 Ed. 1, extents such as this are directed to be made. It appears also that King Ed. 2, in the eleventh year of his reign made a grant of the premises in question to Queen Isabel, to hold during his pleasure. That grant would expire on his death. Then, in the fifth year of Ed. 3, Gildersburg (who appears to have taken the extent in the 1 Ed. 3,) by command of the treasurer, delivers in the rolls to the office whence they are now produced. They are found in the office where such things are usually deposited; and the only ground that can be urged against the reception of the evidence is, that the extent does not appear to have been taken by any competent authority. But, con-

sidering that the extent pursues the directions of the statute, and that it is found in the proper place, it must be presumed that it was duly taken.

BAYLEY, J. Considering that this document was found in the proper office, and that it would have been a breach of duty in the person having the custody of that office to admit any extent not duly taken, I think we must, at this distance of time, presume that it was taken under competent authority. The statute 4 Ed. 1 says that extents are to be taken, not by whom. I therefore think it was the duty of each steward under the crown to take extents from time to time of the lands under his care.

LITTLEDALE, J. I am of the same opinion. If this had been a survey or rental of a private manor it could not have been received. But an act of parliament requires extents to be taken, and in a certain manner. Looking at the exterior of this roll, we find that the document in question is indorsed in the usual manner, and it comes from the proper office. Looking at the internal contents, we find that the person delivering it in was the person who took it, and was, therefore, the proper person to make the return; and that the matters mentioned in it are those of which the statute directs inquiry to be made. After that, there cannot be a doubt that the extent was taken by virtue of a sufficient authority.

PARKER, J. It appears to me that this extent precisely follows the directions of the statute. And if a commission were necessary to give it validity, we might now presume that such a commission once existed, but has been lost; but I have no doubt that it was the duty of the steward to take it without any express directions. The extent was then read; it enumerated,

1st. Free tenants; and, as to them, a fine of tin as in the caption of seisin.

2d. Free conventionaries, but without any fine of tin.

Amongst others, was

"John de Nansmellyn holds half an acre of land, and renders annually 8s. 6d.;" and similar entries as to

Philip of the same;

Jordan of the same; and

Gregory of the same.

3d. Natives and stock.

At the close, "fine of tin of free conventionaries and native is worth by the year 20s."

"Roger de Yonge gives for fine to hold the toll of tin in Tewington, 6s."

The auditor of the duchy of Cornwall then produced from the duchy-office a roll called an Assession Roll, which purported to be an account of the acts done by certain assessors in the 7 Edw. 3, under a commission to them by John Earl of Cornwall, which was there recited.

For the plaintiff it was objected, that no evidence having been given to connect the tenants of the several manors with the proceedings of the commissioners, the roll could not be read; whereupon the parliamentary survey was produced, and in that document, as to Tewington, it was stated, that A. B., &c., holdeth in free conventionary to him and his heirs for ever, from seven years to seven years, according to the custom of the manor, one messuage, &c. At the end of the survey of Tewington the customs of the manor were stated; the first of which was, "there ought to be kept, every seventh year, an assession-court for the said manor, unto which all the customary tenants are by their customs bound to repair, there to enter their claim, and new take the severa!

tenements and parts of tenements that they hold: not that their former title to the same doth then determine, it being by them held to them, their heirs and assigns for ever, according to the custom of the manor; but for that thereby divers advantages do or may accrue to the lord." Several instances of such advantages were then stated, and the survey contained a similar custom as to attending the assession-courts in each of the seventeen manors; but with respect to the right of widows, and the course of descent, the customs were not precisely the same in each manor. After the parliamentary survey, certain documents were produced from the augmentation-office, which appeared to be memorials to the crown from the tenants of several manors in the 9 Car. 1. That from Tewington was as follows: "10th October, 9 Car. 1. Forasmuch as by the course of time this year falleth out to be the assessionable year of the manor aforesaid, parcel of the ancient inheritance of the duchy of Cornwall, at which assessionable year the tenants of the said manor have anciently used to take their customary tenures to them and their heirs from seven years to seven years, according to their custom, by a commission for that service to certain commissioners specially directed; therefore, the customary tenants of the said manor, whose names are subscribed as well for themselves as the residue of the homage absent, made their repair at his majesty's audit, held at Liskeard for the said duchy, the day and year aforesaid, and presented themselves ready to renew their takings according to their said ancient custom, and prayed their admission accordingly. And for that there was at this audit no commission directed for performance of this service, therefore, they humbly pray that their tender may be received by his majesty's auditor of the said duchy for the time being or his deputy." Similar memorials from several other duchy manors were read. It was then conceded, that the assession rolls were admissible.

The commission and assession-roll, 7 Edw. 3, were then read. The commission, directed to all sheriffs, &c., was as follows:—Whereas many of our tenants of our seignory of Cornwall have long holden and do yet hold in divers manors great part of our demesne lands of those parts in convention, rendering for the same lands certain rents by the year, and their terms wholly expire at the feast of St. Michael next coming, as is and ought to be known in the country; and forasmuch as we have the power, without doing wrong to any one, to retake our said lands into our own hands, and make thereof our profit, which may, perhaps, turn to the injury and damage of our said tenants, nevertheless we will, for their ease, that they may henceforth hold by new covenants the same lands in convention, so that they always render to us the true value thereof, in manner as between them and our ministers, whom we have sent thither for this purpose, may be agreed: Therefore, we make known unto you all, that we have appointed as attorneys and put in our place Sir R. C., &c., to assess our lands aforesaid, and to let them in convention by indentures or enrolments for term of life, lives, or years, according as it shall seem to them for the good of our said tenants, who now hold our same lands, or in their default to others who will give us more, and as shall be most for our profit." The roll then contained a statement that they had assessed the lands within mentioned for seven years, and there were entries applicable to the different manors. For Tewington the first entry was "Free conventionaries."

"Nicholas Wysa hath taken one messuage, seven acres of land, in one furling of land, &c." The twenty-ninth entry was, "Philip of Nans-

mellyn hath taken one messuago, cleven acres English in half an acre Cornish, which the same holds in Nansmellyn, to hold in convention as above, by rendering therefore by the year 11s. at the four terms; thereof of new increase 2s. 6d., suit and other services, and he gives to the lord for a fine, &c., and hath done fealty," &c.

John de Nansmellyn,

Jordan de Nansmellyn, and

Gregory de Nansmellyn, also appeared to have taken the tenements which they before held, paying an increased rent of 11s. instead of 8s. 6d.

Several ministers' accounts, corresponding with the rents and fines named in the assession-roll, were then put in; and various other assession-rolls were read, by which it appeared that the free conventionaries always took their lands for seven years, sometimes at an increased, and sometimes at a reduced rent, and they found sureties. In the assession-roll, 9 H. 7, it appeared that a condition was imposed that the free conventionary tenants should leave their farms in good repair. In the assession-roll, 16 H. 7, the free tenants were mentioned for the first time. Of each of them it was said, *tenet* in socagio, &c.; of each of the free conventionaries as before, *cepit*. In the assession-roll, 2 H. 8, there was a special covenant for residence on the tenements. By these rolls, the estate called Nansmellyn was regularly traced down to 1794, when the manor of Tewington was sold, and a part of that estate is the land in question, where the plaintiff sunk the shaft and raised the ore.

The charter granted by King John to the tinners of Cornwall, giving them power to dig tin in all wastes; charters of confirmation, 23 Edw. 1, and 3 H. 4, and grant of pardon, 33 H. 7, which instituted the parliament or convocation of tinners, were then read. The laws made by the convocation as to bounding for tin, were read.

The enrolments of several leases of toll-tin, granted by the crown when there was no Duke of Cornwall, were read, and tollers were examined, who received toll of all tin worked in what was called duchy land, which term is well known throughout the assessionable manors as distinguishing the land of the conventionary tenants from that of the free tenants, which is called fee-land.

The enrolment of a lease was then read, whereby W. III., in the eighth year of his reign, demised, granted, and to farm let to Henry Vincent and F. Scobell, all mines and minerals of whatsoever kind found or to be found, dug, or acquired in any places within the several lordships, manors, precincts, or territories of the duchy of Cornwall, as well opened as to be opened, with full power to dig, &c.; except always and altogether reserved all royal mines, and all mines of tin, and all other minerals within the aforesaid duchy, now granted to any person or persons by letters-patent under the Great Seal of England, or under the seal of the Exchequer; and all tolls, farms, and other dues to us or the farmers there belonging, &c., by any custom or demise heretofore made. Habendum for thirty-one years, rendering one-tenth of the clear profits. Covenant by the lessees not to enter upon any lands in the tenure or possession of any of the tenants of the duchy, or of any person or persons whatsoever, without the consent and permission of the tenants and occupiers of the same lands in that respect before had and obtained.

The enrolment of a similar lease granted by the Duke of Cornwall in 1717, upon the surrender of the former, was then produced.

For the plaintiff it was objected, that this could not be read until evidence had been given of the loss of the original lease, the enrolment

being of a counterpart. It was said, that when the property is in the crown, the enrolment is evidence, because the crown can only grant by matter of record, but that the same reason does not apply to a lease granted by the Duke of Cornwall. In *Kinneraley v. Orpe*, 1 Doug. 56, it was said that the act of the officer of the duchy of Lancaster was evidence; but that case is very different from the present. There the plaintiff, in order to prove his title as lessee of the duchy, produced the original lease; but that contained a proviso, that it should be void unless enrolled within a certain time; and the plaintiff relied on a memorandum in the margin, signed by the auditor, whereby it appeared to have been enrolled. *Buller, J.*, said, the act of the officer was evidence of the enrolment; but that it was unnecessary to decide the point, the lease being admitted by the pleadings. That case, therefore, is rather an authority against the present defendant, for there the original lease was produced.

On the other hand it was contended, that the lease in question contained a clause requiring that it should be enrolled, and that the tenant, by procuring the enrolment, made that evidence. Besides the crown has an interest in the property which it affected, and, consequently, the lease must be considered as if granted by the crown. It was decided very soon after the creation of the duchy, that the Duke of Cornwall has the possessions of the duchy with the same privileges as the king, because it is never disannexed from the crown, *Fitz. Abr. Prerog. pl. 16*. The same evidence must therefore be admissible to prove grants of duchy property, either by the king or the duke of Cornwall.

*LORD TENTERDEN, C. J.* I am of opinion that this enrolment must be received as evidence. The estate of the Duke of Cornwall is of a very peculiar nature, and there is nothing else like it known in this country. The property is vested in the Duke of Cornwall whenever there is such a person, and in the crown when there is not. Whether there is a Duke of Cornwall or not, there is an office called the Duchy Office, and there is an auditor of the duchy accounts, and there are other officers for managing the affairs of the duchy. To say that one rule of evidence as to their proceeding shall prevail when the property is in the crown, and another when it is in the Duke of Cornwall, would be to introduce infinite confusion. Looking at the lease in question (and we must look at it to ascertain whether it be admissible or not), we find in it a clause requiring it to be enrolled. Can any lawyer doubt that the enrolment of such a lease, granted when there was no Duke of Cornwall, would be evidence against the crown at any future time? and on account of the peculiar nature of the dukedom, and the interest which the crown has in the possessions of the dukedom, I think that all the same rules must be applicable to it, whether it be at any particular time vested in a Duke of Cornwall or in the King.

*BAYLEY, J.* I cannot, as to this point, make any distinction between the King and the Duke of Cornwall. To use the phrase of Lord *Hobart*, "*Dux censetur una persona cum rege.*" Now the King cannot alienate the possessions of the crown but by matter of record; and as the fee of the possessions of the duchy is alternately in the Duke of Cornwall and the crown, if the Duke could grant without a record, the crown would be bound without a record. It is, therefore, necessary for the protection, as well of the tenants as the crown, that all grants of duchy property should be by a record. Then there is a regular office and an auditor for managing these matters, whose duty it is to enrol authentic documents

only. On these grounds, I think that the enrolment in question must be received as evidence of the lease.

LITTLEDALE, J. For the purpose of this question, I think that the King and the Duke of Cornwall must be considered as identified. It would be very inconvenient if one rule of evidence should prevail when there is a Duke of Cornwall, and another when there is not.

PARKE, J. I am of the same opinion, on account of the identity of interest between the Duke of Cornwall and the crown. There can be no doubt that the lease would be binding on the crown and the enrolment good evidence, if the crown alone were interested; and I think it cannot be less so, because the crown and the Duke of Cornwall are jointly interested.

The lease in question, and several subsequent leases of a similar nature, were then read.

Several sets or under leases of parts of the demised premises were then put in, which granted permission to dig for copper within certain prescribed limits, in consideration of certain toll.

A witness was then called, who proved the receipt of toll of copper in duchy land for the lessees under the crown, but not in fee land. He was asked whether he had received toll of copper in other manors than Tewington.

For the plaintiff it was objected, that evidence ought not to be received of that which was done in the other manors. The evidence is not relevant, unless to show an incident of tenure or a custom. The defendant cannot be allowed to give evidence of any incident of tenure in another manor to affect Tewington, unless he first shows that the tenure is the same in each. Nor can any evidence of custom in one manor be admitted to prove a custom in another, unless both before the time of legal memory were in the possession of the same person, and formed a part of the same district; for a custom to be binding must have existed from time immemorial. In this case it has been proved that the tenure is not the same throughout the assessionable manors; Tewington, Helleston, and Clymeston being ancient demesne, where the tenants have peculiar privileges, and the other fourteen manors not being so. Again, in the caption of seisin the free conventional tenants in Tewington are said to pay a certain fine of tin, and the same appears in the inquisition post mortem Edmundi; but this is not said of the conventional tenants in other manors. So also in the parliamentary survey, although it is stated as to each manor, that there is an assession court holden every seven years to which the tenants must resort, and that their estates do not then cease, yet it is not stated that in each they hold to them and their heirs for ever, from seven years to seven years, which is stated of the tenants in Tewington and Helleston. The tenure is, therefore, very different; for in those manors the tenants would, according to that statement, take a freehold in interest, but not in the others. In order to get rid of this difficulty, and show the tenure the same, the surrenders and admittances in the different manors should have been produced. According to the opinion of *Fortescue, J.*, in *Duke of Somerset v. France*, 1 Str. 662, the evidence of things done in other manors cannot be given in evidence to affect the manor where the dispute arises, unless the tenure be the same. At first he was the only member of the court who thought the evidence admissible, even under those circumstances; but *Raymond, C. J.*, and *Reynolds, J.*, consented to receive the evidence, upon the assurance that it had been done upon the Northern circuit, and not because they were

convinced of the propriety of it. Now it is somewhat remarkable, that in a subsequent case of *Lowther v. Raw*, Fort. 41, *Fortescue, J.*, rejected such evidence; but the judgment was reversed on the authority of *Somerset v. France*. All the subsequent cases on the point have been determined on the same authority. In *Roe v. Parker*, 5 T. R. 26, and *Stanley v. White*, 14 East, 332, the case of *Somerset v. France* is said by Lord *Kenyon* and Lord *Ellenborough* to have proceeded upon the ground, that all the manors then in question were parcel of the same district, and subject to the same border law, which must mean, that the tenants of all held by the same tenure. In the present case the tenure has not been proved to be the same. Again, in *Stanley v. White*, Lord *Ellenborough* assumed that all the belt of land to which the evidence applied originally belonged to one person, who had granted it out to others, reserving certain rights. Here it has been proved by the early documentary evidence, that all the manors did not originally belong to one person; the tenants of those manors must, therefore, have derived their rights from different persons; and there is no ground for the presumption upon which the Court proceeded in *Stanley v. White*. The evidence in question cannot then be received to prove an incident of tenure. Neither can it be admitted to prove a custom. In *Somerset v. France*, *Fortescue, J.*, although he thought the evidence admissible to show the quality of the tenure, observed, that there was a great difference between that and receiving it to prove a custom. No custom can be good unless it has existed from time immemorial; and, therefore, no common custom can affect these manors, unless before that time they were in the hands of the same person, which has been disproved. Again, by some of the evidence given by the defendant, viz., the assession rolls, it would appear that the plaintiff, and others similarly situated, have not a customary estate, but a mere conventional estate as leaseholders. No custom can attach to an estate of that nature; and the defendant ought not to be allowed, for one purpose, to treat them as conventional tenants, and for another, as customary tenants.

Arguments for the defendant. The evidence tendered is not evidence to prove a custom, but to prove what interest the lord has in those lands which in these seventeen manors have been granted out to the conventional tenants. Custom and tenure are very different things. The tenure must first be established, and then the custom shows in what course that tenure shall go. It is very difficult to say what is the tenure of the conventional tenants in these manors, and that very obscurity is the ground for receiving this evidence. If they were ascertained to be copyholders, or to be leaseholders, the rights arising from such tenure would be easily ascertained; but all that is known of these tenants is that in each of the manors ever since the 7 Ed. 3, and perhaps long before, there have been conventional tenants; that in each there is an assession court holden once in seven years, at which the conventional tenants come and renew their holdings. In all the manors they take for seven years, although from long usage it cannot now be said that their rights cease at the end of that term. This similarity, affecting all the seventeen manors, is sufficient to show that they form one district under the same lord, where he has in all probability reserved throughout similar rights to himself in the grants made to the tenants bearing the same description. Evidence of rights exercised by the lord over conventional tenements in one of these manors may therefore be received to show what rights he has reserved throughout the district. In *Tyrwhitt v. Wynne*, 2 B. & A. 554, it was held that leases of minerals under one part of a waste were evidence of

the lessor's right to the minerals under another part; both being proved to be parcels of the same district. This principle was recognised by Lord *Ellenborough* in *Rex v. Ellis*, 1 M. & S. 662, where he cites *Lord Barclay's case* from Hale de Jur. Mar. 85, and observes, that the evidence as to other manors was not so properly to be considered evidence of the custom of one manor to prove the custom of another, but evidence to prove one and the same custom affecting a whole district of manors. This is consistent with the doctrine of Sir M. Wright,<sup>(a)</sup> who says, that in considering the nature of fenda, the nature of the province where they lie is to be kept in view.

LORD TENTERDEN, C. J. I am of opinion that the Court are bound to receive this evidence. It appears by the documents which have been produced, that before and at the time of the creation of the duchy, courts called assession courts were or ought to have been held every seventh year under a commission from the lord of the soil, desiring certain persons to repair to these manors, which were then all in one hand, and let the lands to the best advantage of the owner. A distinct court, under the same commission, was held for each manor; and we find by the returns that there were a class of tenants called free conventional tenants, distinguished from free tenants and from native conventionaries, as long as the latter class (which now appears to be extinct) continued to exist. In each manor the free conventional tenants are said to come and take their lands for seven years. If there were no other evidence they would be pure leaseholders; but by the parliamentary survey it appears that certain commissioners were sent down to inquire into the possessions of the duchy, and in every manor these tenants claim substantially the same rights, although with some minute variations as to the descent of their estates or the rights of their widows. They state that they must attend the assession courts and renew their holdings, but that their right does not cease at the expiration of the seven years. Thus if we take the earlier evidence alone they are all leaseholders; if we take the latter, also, the same character (whatever that may be) belongs to them all. It may be very difficult to say precisely what that character is. It is very peculiar, and not known in any other part of the country, but certainly belongs to all those called free conventionaries in this district. Must we not then, in fairness, in order to ascertain what are the relative rights of the lord and these tenants, in one part of this district, inquire what are their rights in another? It appears to me that plain reason and common sense require it, without resorting to decided cases, or nice and subtle distinctions as to whether the matter in dispute be in the nature of tenure or custom. This is not, properly speaking, a question of tenure, nor a question of custom, such as the course of descent attached to the tenure, but a question as to what the lord parted with to those who are called conventional tenants.

BAYLEY, J. Generally speaking a party cannot be allowed to prove the custom of one manor by evidence of a custom in another, unless a connection between them be first established. But when, in a case circumstanced as this is, we find a certain class of tenants existing from a very early period down to the present time, the terms of whose tenancy are expressed in language that leaves their rights in doubt, and when we find in each manor contemporaneous grants to the same class of tenants in the same words, may we not inquire what was enjoyed under those words in one manor, in order to ascertain what was granted by them in

(a) Wright's Tenures, edition 1768, p. 36.



another. It has been the constant practice to construe documents by usage. Thus, where a grant is made to hold to A. B., and C. *successive*, usage explains the meaning of that word. Now looking at the extent of these manors in the 1 Ed. 8, we find free conventional tenants mentioned, but the terms of the convention are not stated. The same observation applies to the caption of seisin. There, indeed, a fine of tin is spoken of, but it is quite silent as to the right to minerals in general. Similar language is used with respect to the free conventionaries in each of these manors. I am, therefore, of opinion, that the usage which has prevailed in one part, and is therefore evidence to explain the meaning of the grant there, is evidence to explain a grant expressed in similar terms as to any other part of the district.

LITLEDALE, J., on the following morning, said, that having examined the authorities, he concurred in the opinion expressed by Lord *Tenterden* and *Bayley*, J.

PARKE, J., was absent during the argument, and gave no opinion.

Several witnesses were then called, who proved the receipt of toll of copper worked in duchy land in other manors.

The answers of the tenants to certain interrogatories put to them at the assession court, 1 Eliz., were tendered, and objected to, because the interrogatories were not produced. It was proved that search had been made for them, but they could not be found.

LORD TENTERDEN, C. J. We must allow the answers to be read. If there is any obscurity in them for want of the questions, that will destroy their effect.

For the plaintiff, evidence was given in reply, that courts leet were holden for the different manors, and court rolls kept; that surrenders and admittances were made from time to time and entered on these rolls; that the admissions to the tenements called conventional were "to the tenants, their heirs, and assigns for ever, according to the custom of the manor, doing the services and paying the rents accustomed. Fealty done, and pledges for reparations, payment of rents," &c. That these tenants leased for fourteen or twenty-one years without any license from the lord, and that they cut and sold timber occasionally, but it did not distinctly appear that the lord knew of it. It was also proved, that in several instances where the lessees under the Duke of Cornwall attempted to sink shafts in conventional tenements for the purpose of getting copper ore, the owners of the tenements resisted, and that in some cases the works were discontinued; in others, a consideration was given to the tenants, in order that the works might be allowed to proceed.

LORD TENTERDEN, C. J., in summing up, told the jury, that the question in the cause was, whether the owner of a conventional tenement was entitled to the copper found under it; or, whether it belonged to the Duke of Cornwall; and that there was no question here as to the right to enter and dig for it. That in many manors it happened that the lord of the soil was entitled to the minerals, but had no right to enter upon the lands of the copyhold tenants, to search for and obtain those minerals, without the consent of the tenants, and that all the evidence given by the plaintiff as to the interruption of workings might be explained by the right of the tenant to prevent the owner of the minerals from digging for them without his consent. His Lordship then directed the attention of the jury to the documentary and parol evidence, and observed, that even allowing the conventional tenants to have in their estates the largest interest that they had ever claimed, viz. from seven years to seven years,

renewable for ever, that would not give them a right to the minerals; and, although a distinct positive usage for the conventional tenants to take the minerals might be valid in law, it was incumbent on them to prove it, for otherwise the right would remain in the lord.

Verdict for the defendant.

*Brougham, Erskine, Patteson, and Follett*, for the plaintiff.

The *Attorney and Solicitor-General*, Sir *J. Scarlett, Harrison, Dampier, and Coleridge*, for the defendant.

### DOE, on the demise of ROBY, v. MAISEY. (a) — p. 767.

In ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only; and may be treated either as tenant or trespasser, at the election of the mortgagee.

**EJECTMENT.** At the trial, before *Gaselee, J.*, at the last Gloucester Summer assizes, it appeared that the premises had been mortgaged in fee by the defendant to the lessor of the plaintiff, that the mortgage was forfeited, and that the defendant remained in possession. The usual evidence of the mortgage deed was given, but there was no proof of any demand of possession. Upon this it was contended, that the plaintiff ought to be nonsuited; but the learned judge directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

*Talfourd* now moved, accordingly, to enter a nonsuit. He admitted, that the long-established practice had been for a mortgagee to recover without proof of any notice; but he contended that the mortgagor, when allowed to remain in possession, was in the situation of tenant at will to the mortgagee, and therefore could not be treated as a trespasser till the determination of the will; and he cited *Partridge v. Bere*, 5 B. & A. 604, to show that the relation of landlord and tenant subsisted. But

Lord TENTERDEN, C. J. The mortgagor is not in the situation of tenant at all; or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee.

Rule refused.

(a) This case was moved early in the term.

### WHITTAKER v. WHITTAKER and Another.—p. 768.

In actions by original, the judgment relates to the essoign day of the term in which it is signed.

THIS was an action by original, and the defendants gave a cognovit. On the 5th of November, 1828, one of the defendants died. Afterwards, during Michaelmas term, judgment was entered up. A rule nisi to set aside this proceeding as irregular having been obtained,

*Richards* showed cause, and contended that, according to *Samuel v. Evans*, 2 T. R. 569, the judgment when entered had relation to the essoign day of the term, and must be treated as signed before the death of the defendant.

*Tomlinson*, contra. In proceedings by original, the judgment relates to the first day of full term, for until then, it could not be actually signed, *Hugh v. Robinson*, 1. T. R. 116.

BAYLEY, J. I think that in an action by original the judgment relates to the essoign day of the term, and if so, the proceedings in this case are regular.

LITLEDALE, J. I am of the same opinion. It appears to me from the expression in the statute of frauds respecting the operation of docketed judgments, that in actions by original the judgment refers to the essoign day.

Rule discharged.

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WELLS, Administrator, v. GURNEY. — p. 769.

Where, by the contrivance of plaintiff's attorney, a party had been arrested on a Sunday on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till Monday, and then arrested on the civil process, the Court ordered him to be discharged out of custody.

Quære, Whether a party can be arrested a third time for the same cause of action.

A RULE nisi had been obtained for discharging the defendant out of custody, he having been arrested a third time for the same cause of action. Upon cause being shown, the Court referred it to the master to report on the facts. He made the following report — The action was brought on a bond; and on the 7th July, the defendant was arrested the first time, and discharged from custody on the ground that there was no *ac etiam* to the writ. He was immediately arrested a second time, and discharged by *Bayley, J.*, on the ground that the first action had not been discontinued. On Sunday, the 16th November, he was apprehended upon a warrant for an alleged assault upon one Parlett, and on the following day taken to Bow Street, where he was bailed for the assault, and arrested there again the third time. The defendant in his affidavits suggested, that the charge of assault was fictitious, and a contrivance of Bozon, the plaintiff's attorney, to get the defendant to Bow Street for the purpose of arresting him. He, however, failed in establishing that the charge was fictitious altogether, but proved that there was a hostile feeling towards him on the part of Bozon, the attorney, and that the latter and Parlett were acting in concert, and that the carrying of the defendant to Bow Street was made use of to effect the arrest.

*Crowder* and *Kelly* now showed cause. The defendant was properly arrested. The charge of assault was not fabricated. An actual assault was proved before the magistrate, and the defendant was ordered to find bail. The warrant was taken out by Parlett before he had any communication with Bozon, and not for the purpose of this cause. It might lawfully be made available afterwards for the purpose of executing civil process. This case is distinguishable from *Birch v. Prodger*, 1 N. Rep.

135: there the person arrested was illegally seized in the first instance by the plaintiff in the cause; the original taking was unlawful. In this case the original taking was lawful, and was not effected by the plaintiff. If some contrivance be not allowed to apprehend those who seek to elude the service of process, the administration of justice will be frequently prevented. It is sufficient if the means used be lawful. The third arrest is not vexatious. [*Parke, J.* Is there any case in which a third arrest for the same cause of action has been held to be valid?] There is no such case; but, on principle, such an arrest may be valid. Where the defendant has been released from an arrest previously made, on a point of form, and the plaintiff has been guilty of no vexatious conduct, he is entitled to arrest the defendant again; and in *Kearney v. King*, 1 Chit. 272, after a nonsuit on the ground of variance in a former action, in which the defendant was arrested, it was held, that he might be arrested in a second action for the same cause.

*Campbell*, (with whom were *F. Pollock* and *Holroyd*,) contra, was stopped by the Court.

*BAYLEY, J.* An arrest cannot be made on civil process on a Sunday; but very different means may be used to execute civil and criminal process. For the purpose of executing the latter description of process, the outer door may be broken open; while for that of executing the former, it cannot. In this case the defendant has been a third time arrested; and it is clear that the criminal process was used on the Sunday to give the plaintiff an opportunity of making the arrest on the civil process on Monday, and by the execution of the criminal process on the Sunday, the defendant was taken into custody and detained till Monday, and the plaintiff was thereby enabled to arrest him on the civil process on that day. It is said that the plaintiff might lawfully use these means to arrest him; but I think, that as the arrest on civil process would not have been good upon the Sunday, the arrest on that process on the Monday, effected by means of the previous arrest on the criminal process and detention till the Monday, ought not to be allowed. I admit that contrivances must sometimes be used, in order to execute the civil process of courts of justice; but those contrivances ought to be such as may be lawfully used on the execution of civil process, and an arrest by means of criminal process is not a lawful contrivance.

*PARKE, J.* I think it very doubtful whether a plaintiff can, in any case, lawfully arrest his debtor a third time for the same cause of action. The general rule is, that a man shall not be arrested a second time for the same cause of action. But where a plaintiff has not been able to make the first arrest available, he may then, provided it be without any vexatious conduct on his part, arrest a second time. That is an exception to the general rule. Without giving any decided opinion on that point, I doubt whether the exception can be extended to warrant a third arrest. But, for the reasons given by my brother *Bayley*, I think the rule ought to be made absolute. Rule absolute. The defendant to bring no action if

Bozon should within two days pay the costs.

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The KING v. ROBERT SHIPTON. — p. 772.

The statute 56 G. 3, c. 139, s. 2, enacts, that in all cases where the residence or estab-

lishment of business of the person to whom any child shall be bound, shall be within a different county from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed, as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve: Held, that in such case the indenture must be allowed by four distinct persons, two of them being justices of the county from which the apprentice is to be bound, and the other two being justices of the county into which he is to be bound.

**INDICTMENT** for disobeying an order of justices. The indictment stated, that on the 2d of January, 1826, W. Ryley was an overseer of the poor of the parish of Hanbury, in the county of Stafford; and that on the day and year aforesaid, Ryley and T. Robotham were the churchwardens; and that G. Hinckley and T. Orme were the overseers of the poor; and that Ryley, Hinckley, and Orme were, on the day and year last aforesaid, the major part of the churchwardens and overseers of the poor of Hanbury, in the said county of Stafford; and that the defendant, late of the parish of Scropton and Foston, in the county of Derby, yeoman, before and on the day and year aforesaid was, and during all the times after mentioned, and from thence for the space of one year then next following, continued to be the occupier of certain lands situated in the parish of Hanbury, in the county of Stafford; and that the place of residence of the defendant, as also the establishment in trade and place of business of the defendant, was during all the time aforesaid at Scropton, within the parish of Scropton and Foston aforesaid, in the county of Derby aforesaid, and within the distance of forty miles from the parish of Hanbury aforesaid; that Hinckley and Orme, so being such overseers as aforesaid theretofore, to wit, on, &c., at, &c., with the assent of Sir O. Mosley, Bart., and T. K. Hall, Esq., *two justices of the peace in and for the county of Stafford*, dwelling near the said parish of Hanbury, did see fit and convenient, and did appoint that Charles Vernon, aged nine years, a poor child of the parish of Hanbury, whose parents were not by the said churchwardens and overseers of the poor thought able to keep and maintain him, should be bound apprentice to the defendant, so being such occupier of land as aforesaid, and having his place of residence and establishment in trade and place of business at Scropton, in the parish of Scropton and Foston aforesaid, and within a reasonable distance and within the distance of forty miles from the parish of Hanbury aforesaid, until Vernon should accomplish his full age of twenty-one years, according to the statute in that case made and provided; that on the day and year aforesaid, at Hanbury, in the county of Stafford, and before Vernon was bound apprentice by the said overseers of the poor of the parish of Hanbury to the defendant, he, Vernon, was carried before the said Sir O. Mosley and T. K. Hall, Esq., so being such justices as aforesaid; and that they examined the father and mother of Vernon, and inquired into the propriety of binding Vernon apprentice to the defendant, to whom it was proposed by the overseers of the said parish of Hanbury to bind the said Vernon; and that the said Sir O. Mosley and T. K. Hall, so being such justices, did particularly inquire and consider whether the defendant resided or had his place of business within a reasonable distance of the said parish of Hanbury, to which Vernon belonged, having regard to the means of communication between Hanbury and Scrop-

ton and Foston, where the defendant so resided and had his place of business; and whether there were any circumstances which should make it fit in their judgment that the said child should be placed apprentice at a greater distance; and did also inquire into the circumstances and character of the defendant; and that they, Sir O. M. and T. K. H., did upon such examination and inquiry think it proper that Vernon should be bound apprentice to the defendant; and that they, Sir O. M. and T. K. H., so being such justices, made an order under their hands and seals, bearing date, &c., as aforesaid, whereby they declared that the defendant was a fit person to whom Vernon might be bound an apprentice, and thereupon did thereby order that the said overseers of the poor of the said parish of Hanbury should be at liberty to bind Vernon apprentice accordingly; and that they, Sir O. M. and T. K. H., Esq., did afterwards at the parish of Hanbury, in the county of Stafford, deliver the said order for binding Vernon apprentice to the defendant, to the said overseers of the poor of the said parish of Hanbury aforesaid, as the warrant for binding Vernon apprentice; that after the making of the order they signed their allowance of the indenture of apprenticeship thereafter mentioned, for the binding of Vernon by the said churchwardens and overseers of the poor of the parish of Hanbury to the defendant, before the same had been executed by any of the other parties thereto; that on the 7th of January, 1826, at Egginton, in the county of Derby, the indentures were allowed by the said Sir O. Mosley, Bart., Ashton Nicholas Mosley, and T. K. Hall, Esquires, then and there being three of his majesty's justices of the peace in and for the county of Derby, and dwelling near to the parish of Scropton and Foston, in the said county of Derby; that before the last-mentioned allowance of the indentures, to wit: on the 2d January, 1826, due notice was given to the overseers of the parish of Scropton and Foston, of the intention of the overseers of the said parish of Hanbury to bind Vernon apprentice within the parish of S. and F., and to apply for the said last-mentioned allowance by the said justices; and that the notice was duly proved before Sir O. Mosley, A. N. Mosley, and T. K. Hall, before they signed the indentures; that Ryley, so being such churchwarden, and Hinckley and Orme, so being such overseers as aforesaid, and Ryley, Hinckley, and Orme, so being the major part of such churchwardens and overseers as aforesaid, (to wit, on the 7th of January, in the year aforesaid, at Hanburg, in the county of Stafford), caused two parts of a certain indenture to be prepared, bearing date the same day and year last aforesaid, whereby it was witnessed that Ryley, as one of such churchwardens of Hanbury, and Hinckley and Orme, as such overseers of Hanbury, with the consent of two of his majesty's justices of the peace for the county of Stafford, whose names were thereunto subscribed, that is to say, the said Sir O. Mosley and T. K. Hall, so being such justices in and for the county of Stafford, and of the said Sir O. M., A. N. M., and T. K. Hall, Esqrs., then being three of his majesty's justices of the peace in and for the county of Derby, whose names were thereunto subscribed, and in pursuance of an order in writing thereunto annexed, made by and under the hands and seals of Sir O. Mosley and T. K. Hall, Esq., justices of the peace of the said county of Stafford, in pursuance of the statuta mentioned therein, bearing date 2d January, 1826, had put and placed Vernon apprentice to the defendant, of the parish of Scropton and Foston, in the county of Derby aforesaid, with him to dwell and serve from the day of the date of the indenture until twenty-one, &c., &c.; that Ryley, so being one of the churchwardens, and Hinckley and Orme, sc

being overseers of the poor, and Ryley, Hinckley, and Orme, so being the major part of such churchwardens and overseers of the poor of the parish of Hanbury, in the county of Stafford, then and there respectively signed and executed one part of the said indenture, which was then and there allowed and confirmed by Sir O. Mosley, A. N. Mosley, and T. K. Hall, so being such justices for the counties of Stafford and Derby as aforesaid, who did then and there consent to the putting forth Vernon apprentice; of all which said several premises the defendant, so being such occupier of lands as aforesaid, and so residing and having his establishment in trade and of business as aforesaid, afterwards, to wit, on the day and year last aforesaid, at Scropton aforesaid, in the county of Derby, had notice. The count then stated the tender of the apprentice, together with the indenture so executed and allowed, to the defendant; a request by Orme, so being overseer of Hanbury, to receive him, and to execute the other part of the indenture, and the defendant's refusal.

The second count stated, that on the seventh of January, 1826, Vernon, a poor child, being settled in the parish of Hanbury, in the county of Stafford, whose parents were by the churchwardens and overseers of the poor of the last mentioned parish considered unable to keep and maintain Vernon, was, by Ryley, Hinckley, and Orme, the major part of the churchwardens and overseers of the poor of the last mentioned parish, and by the consent and allowance of Sir O. M., Bart. and T. K. Hall, two of his majesty's justices of the peace in and for the county of Stafford, and of the said Sir O. M., A. N. Mosley, Esq., and T. K. Hall, three of his majesty's justices of the peace for the county of Derby, by indenture duly executed, duly bound apprentice to the defendant of the parish of Scropton and Foston in the said county, the defendant then being an occupier of lands in the said parish of Hanbury, and having his place of residence and establishment of business at Scropton, in the parish of Foston and Scropton aforesaid, and within forty miles of the parish of Hanbury aforesaid, until Vernon should attain twenty-one years of age; that the defendant was tendered the apprentice, together with the indenture, and request made to receive him; but that he refused to receive him or to execute the other part of the indenture as in the first count. General demurrer.

*N. R. Clarke*, in support of the demurrer. The indictment is bad. First, it does not appear that the indenture was allowed by two justices of the county of Derby as well as by two justices of the county of Stafford. The binding is by the officers of a parish in the county of Stafford to a master living in a parish in the county of Derby. The statute 56 G. 3. c. 139, requires that in such case the indenture shall be allowed by two justices of the county in which the binding parish is situate, *as well as* by two justices of the county in which the parish where the apprentice is to serve is situate. These words of themselves import, in true grammatical construction, that in such case the indentures shall be allowed by four distinct justices. It seems, besides, an absurdity to say, that the justices of the county from which the binding takes place shall institute all the inquiries directed by the first section, shall then make an order for the binding, shall sign their allowance of the indentures before they are executed by any of the parties; and that the same two justices shall then, in another character, consider of the propriety of the binding which has taken place in pursuance of their own order, and has been already allowed by them after the fullest inquiry into every circumstance which it would appear ought to influence their judgment; and shall then go through the form which must be admitted to be necessary, of a *second time* signing their allowance to

the same indenture. The legislature must have had some object in requiring the concurrence of magistrates of both counties; and it appears by the preamble, that the object of the various regulations was to remedy "*grievances which had arisen from binding poor children apprentices by parish officers to improper persons residing at a distance from the parishes to which such poor children belong,*" &c. This regulation as to the justices must, therefore, have been intended to operate as a check upon the system which then prevailed of binding children into other counties far from their homes; but this check will be rendered much less effectual and beneficial if the construction contended for on the other side prevails; and, in almost every case where the binding parish is on the borders of a county, it will be altogether inoperative, as magistrates who reside near the borders of their county are generally put into the commission for the adjoining county, as a convenience in matters of police, without having any property or interest in such county. If it was the intention of the legislature to protect the master's parish from being overburdened with apprentices, it is manifest that such intention would frequently be defeated by the construction contended for by the other side. If it was supposed that the justices of the county in which the master resides would be more likely to know his character than the justices who order the binding, this cannot apply to the justices who order the binding, and afterwards allow it merely because they happen to be in the commission for the other county. It is true, as the statute says nothing about residence, the apparent intention of the legislature may sometimes be defeated under any construction of the statute; but it will be less likely to be defeated, and improper bindings into distant places less liable to take place, if the concurrence of four justices is necessary. If, as appears probable, the two justices mentioned in the second section were intended to act as an appellate jurisdiction from the two magistrates who order the binding, it could never be intended that they should be the same persons. The words of the statute are not merely directory, as the master is prohibited from taking the apprentice (unless bound as the act directs) under a penalty of 10*l*.

*Starkie, contra.* There is nothing in the 56 G. 3, c. 139, s. 2, to show that the legislature intended that the justices of the second county who allow the indentures shall be different persons from those who allow them in the first. The terms of the clause are satisfied by an allowance by the same justices having jurisdiction in both counties. That section was not intended to create an appellate jurisdiction, or to operate as a check on the justices of the first, but to give the overseers of the place into which the party is bound an opportunity of objecting to the terms; and, secondly, to give jurisdiction to the magistrates who would not otherwise have jurisdiction. The 43 Eliz. c. 2, s. 9, enacts, "that if a parish shall extend itself into more counties than one, or part lie within the liberty of any city and part without, then the justices shall deal and intermeddle only in so much of the parish as lieth within their liberties and not further; and every of them respectively, within their several limits and jurisdictions, is to execute the ordinances before mentioned concerning the nomination of overseers, the consent to binding apprentices," &c. This clause, therefore, would have prevented the justices of one county from intermeddling in another without some express authority. Further, by sect. 1 of that statute, the binding is to be allowed by two justices dwelling in or near the parish or division; and by statute 56 G. 3, c. 139, inquiry is to be made before allowance of the indentures by two justices



of the county in which the binding parish is situate. But there is no provision in that statute, either in respect of residence or inquiry by the justices of the county in which the apprentice is to serve. The principal object of the legislature, in requiring a second allowance in cases where the child was to be bound in a parish situate within a different jurisdiction, was to give the officers of the latter parish an opportunity of objecting to the binding there; that, in fact, is the original object intimated, and for that purpose notice is to be given to those officers previous to the second allowance. For although the statute is very specific in requiring the justices of the county in which the child resides, to make every possible inquiry as to the propriety of binding him to a person living at a distance, no such inquiry is directed to be made by the two justices previous to the second allowance; and yet it is very remarkable that if their jurisdiction was intended to be either of an appellate nature, or if it was even meant that they should make original inquiries of a similar description with those which the statute directs to be made previous to the first allowance, such duties should not have been specifically enjoined. If, on account of the distance of the parish to which the child was to be bound, further inquiry had been considered necessary by other justices, the necessity of such second inquiry would, it is reasonable to suppose, have been regulated, not by the difference of jurisdiction, but by distance. Considering, therefore, the reason of requiring such second allowance, there is no ground for supposing that the legislature meant that the indentures should be allowed in the second instance by other and different justices; and in point of convenience, it might be more desirable that the same persons having jurisdiction, being already in possession of the facts of the case, should decide on the objection, even if made by the officers of the parish into which the child was to be bound.

BAYLEY, J. The words of the statute 56 G. 3, c. 139, s. 2, are, "that every indenture shall be allowed, as well by two justices for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices for the county or district within which the place shall be situated wherein such child shall be intended to serve." The words, therefore, require that the indenture shall be allowed as well by two justices of one county as by two justices of the other. The statute does not in terms say that the indenture shall be allowed by two justices of each county; but that it shall be allowed as well by two justices of the one as by two justices of the other. I cannot assign any good reason why the justices having jurisdiction in the two counties should be different persons; but I think it dangerous to speculate on the intention of the legislature. The safer rule of construction is to abide by the words of the statute. If the language used by the legislature be such as to imply that the indenture shall be allowed by two justices of the first county, and also by two other persons, being justices of the other county, we must give effect to those words. I think the words, *primâ facie*, import that the justices who allow the indentures in the second county shall be different persons from those who allow them in the first; and there is nothing in the other parts of the act to show that such was not the intention of the legislature. Giving these words, therefore, their fair grammatical construction, I think that the indenture mentioned in this indictment ought to have been allowed by two justices of the county of Derby, being different persons from the two justices of the county of Stafford, who first allowed it; and that for want of such allowance the indenture is void; and, consequently, that the indictment against

the defendant for refusing to receive the apprentice cannot be supported. The judgment of the Court must, therefore, be for the defendant.

LITLEDALE, J. I am of the same opinion. I cannot collect from the statute that it was the intention of the legislature, that the magistrates of the two counties should act as a check upon each other; and I cannot see any reason why the magistrates should be different persons. I see no reason why, when two justices have jurisdiction to consent to the binding of apprentices by one parish to another in the same county, the same justices should not also have jurisdiction to consent to the binding of them in a case where the parishes are in different counties. But it seems to me, nevertheless, that the words of this act of parliament do require that the magistrates of the two counties should be different persons. It enacts, that the indentures shall be allowed as well by two justices for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices for the county or district within which the place shall be situated wherein such child shall be intended to serve. Now, the magistrates of the two counties might be, and, generally speaking, are, two different persons. That being so, giving these words a grammatical construction, they seem to me to require that the magistrates of the two counties shall be different persons. I think, therefore, that the indenture should have been allowed by two justices of the county in which the binding parish is situate, and also by two justices of the county in which the parish in which the apprentice was to serve is situate.

PARKE, J. I think that we are bound by the words of the act of parliament, to hold that, in a case where the two parishes are situate in different counties, the indenture must be allowed by four justices, two of them being justices of the county where the binding parish is situate, and the other two being justices of the county in which the parish wherein the apprentice is intended to serve is situate.

Judgment for the defendant.

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The KING v. JOHN WINTER, Esq.—p. 785.

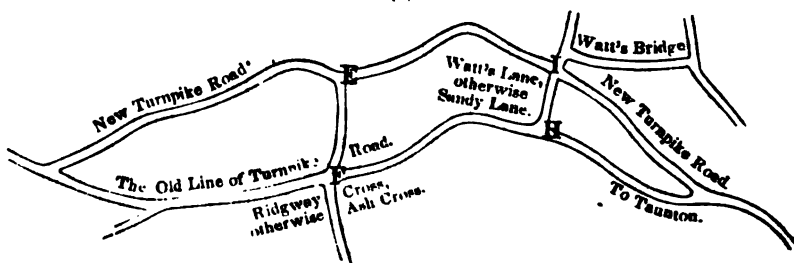
An order of justices, for diverting and stopping up a highway, substituted for the old highway a new road, which passed partly over a road, described in the order as a new line of turnpike road. The sessions confirmed the order, subject to a case. This Court quashed the order of sessions, because it did not appear on the face of the order or of the case, that the public had the same permanent right to pass over the new road as they had to pass along the old one.

Quære, Whether justices can divert a road for carriages and continue it for foot-passengers.

Two justices of the county of Somerset made the following order for diverting and turning a road:—"Somerset to wit. We, A. B. and C. D., two of the justices of the said county, at a special sessions for the highways, held at, &c., on the 11th of December, 1827, having, upon view, found that a certain part of the highway within the parish of Bishop's Lydeard in the said county, called Watt's Lane, otherwise called Sandy Lane, lying between the road described in the plan hereunto annexed, as the new line of turnpike road from Taunton to Hartrow gate, in the parish of Stogumber, at or near a certain bridge called Watt's bridge, marked on the plan with the letter L., and the public highway heretofore part of the turnpike road from Taunton to Hartrow gate aforesaid, at or near a certain dwelling house in the occupation of James Markes, marked

in the plan with the letter H., for the length of 286 yards, or thereabouts, and particularly described in the plan hereunto annexed, may be diverted and turned so as to make the same more commodious to the public; and having viewed a course proposed for the new highway in lieu thereof, through the lands and grounds of Sir T. B. Lethbridge of Sandhill park, in the said county, lying between the said new line of turnpike road from Taunton to Hartrow Gate, at or near a certain turning in the said last mentioned turnpike road in the parish of Ashpriors, in the said county, marked on the plan with the letter E., (a) and the said public highway heretofore part of the turnpike road from Taunton to Hartrow gate, at or near a place called the Cross at Ridgway, otherwise called Ash Cross, in the parish of Bishop's Lydeard, in the said county, marked on the plan with the letter F., of the length of 466 yards or thereabouts, and of the breadth of sixteen feet or thereabouts, particularly described in the plan hereunto annexed; and having received evidence of the consent of Sir T. B. Lethbridge, by writing under his hand and seal, to the said new highway being made through his lands and grounds hereinbefore described, in consideration of the said part of the said old highway, hereby ordered to be diverted and turned, being sold, exchanged, and to be vested in him, saving always and reserving a free passage for all persons on foot through the land and soil of the said part of the said old highway hereby ordered to be diverted and turned, according to the ancient usage and custom in that respect, We do hereby order that the said last mentioned highway be diverted and turned through the lands aforesaid; and when the said new highway shall be made and completed and fit for the reception of travellers, and so certified by two justices of the peace for the county of Somerset, upon view thereof; and after such certificate shall have been returned to the clerk, of the peace of the said county, and by him enrolled amongst the records of the court of quarter sessions at the general quarter sessions of the peace for the said county, at which this our order shall have been confirmed or enrolled pursuant to the statute in that case made and provided, we do hereby order the said part of the said old highway hereby ordered to be diverted and turned, being of the length of 286 yards or thereabouts, and of the breadth of twelve feet or thereabouts upon a medium, as appears by the said plan, to be stopped up, subject to and saving always, and reserving nevertheless a free passage for all persons on foot through the land and soil of the said part of the said old highway so hereby ordered to be diverted and turned, and stopped up according to the ancient usage in that respect; and whereas the said Sir T. B. Lethbridge hath consented to the making and continuing of the said new highway through his lands, in consideration that the said part of the said

(a)



old highway hereby ordered to be diverted and turned and stopped up, be sold and exchanged, and vested in him, saving always and reserving nevertheless as aforesaid, we do hereby order that the said lands, grounds and soil of Sir T. B. Lethbridge for the said new highway hereby ordered to be made as aforesaid, be purchased by the sale, disposal, and exchange of the said part of the said old highway hereby ordered to be diverted, turned, and stopped up, and the same to be vested in him, subject to and saving always, and reserving as aforesaid; and we do hereby approve and direct, that the surveyors of the highways of the parish of Bishop's Lydeard shall make an agreement with Sir T. B. Lethbridge, being the person seised, possessed of, and interested in the said lands, ground, and soil through which the said highway hereby ordered to be diverted and turned, is hereby ordered to and will go; for the recompense to be made for such ground, and for the making of such new ditches and fences as shall be necessary, by the sale, disposal, and exchange to and with Sir T. B. Lethbridge of the said part of the said old highway hereby ordered to be diverted, turned, and stopped up, and the same being vested in Sir T. B. Lethbridge, subject and saving always, and reserving nevertheless as aforesaid." The sessions, on appeal, confirmed this order, subject to the opinion of this Court, Whether the order could be legally made under the statute 55 G. 3, inasmuch as the intended new road from E. to F. did not either commence or terminate at the same points as the road to be stopped up,—the distance between the points I. and E. being 1154 yards, and the distance between the points H. and F. being 1063 yards; and, also, as the said highway from F. to H. was one of the roads included in the act of the 3 G. 4, c. 65, entitled "An act to repeal several acts passed for repairing several roads leading to the town of Bridgewater in the county of Somerset, and several other roads therein mentioned, so far as the said acts relate to the roads leading to the said town, and to consolidate and comprise the same in one act of parliament."

*C. F. Williams, Cabell, and Rogers*, in support of the order of sessions. The order was legally made. The highway from I. to H. was legally exchanged for the new highway from E. to F., as the new highway together with the pre-existing road from I. to E., carried the public to and from the same destination as the old highway from I. to H., together with the other old highway from H. to F. It is not necessary that the diversion of a highway should be effected wholly by a new highway given by the order. It is sufficient that some part or parts (no matter how small) of the highway given by the order should be wholly new. The remainder may consist of an old or pre-existing highway. These positions are established by the case of *De Ponthieu v. Pennyfeather and Another*, 5 Taunt. 684. It is true, that in that case the diversion commenced with a new highway, and ended in carrying the public to the terminus ad quem by means of a continuation of more than one old highway. But that circumstance is quite immaterial. For if the old highway may be at the end of the new highway, it may be before the commencement of the new. In law, a highway ordered to be diverted from A. to B. is ordered to be diverted from B. to A. Now, whether the diversion be effected by a highway wholly new, or by a highway partly old or pre-existing and partly new, or vice versa, it is not possible that the new highway should commence or terminate at the same points as the old highway ordered to be diverted and stopped up. Suppose a portion of a highway ordered to be diverted, the extremities of which form lines placed at a right or at any other

angle to the side of such highway : in every case the new highway must be placed on one side or other of the remainder of such highway of which the portion has been ordered to be diverted, or of some other highway connected with it ; but the new highway must of necessity be placed without the portion ordered to be diverted, or the whole of that portion would not be diverted ; therefore, the new highway cannot commence at or terminate in the same points as the old highway ordered to be diverted or stopped up. If so, there is a certain distance, no matter how small, which must exist between the old highway, ordered to be diverted and stopped up, and the new highway ; and that distance must consist of the remainder of the old highway of which the portion has been ordered to be diverted, or of some other highway connected with it. [*Bayley, J.* The order of justices substitutes the road E. F. for I. H. Suppose a person desirous of going from I. to F., he must go by I. E. F. ; but the order describes the road from I. to E. to be a new turnpike road. It was probably made so for a term of years ; and then there is nothing to secure to the public the right of using that road after the expiration of that term of years.] The public have a permanent right over the whole line from I. by E. to F. In that portion of it which extends from F. to E. that right is secured to them by this order of magistrates. In the remaining portion from E. to I. (though the fact be not stated in the order or the case) their right is permanently secured by an order of the trustees of the Taunton turnpike road, which has substituted that road for the old turnpike road from H. to F. Where trustees make a new turnpike road, it becomes a *permanent* public highway : it is indictable and repairable as such, and has every other characteristic of a highway ; and although the authority of the trustees over such a road may be limited in point of duration, yet the right of the public to use such a road is not so limited. There can be no such thing as a temporary highway. There are analogous cases where persons, having only a temporary power, may do permanent acts ; as a lord of a manor for life or for years, as guardian, may grant copyholds in fee, if warranted by the custom. Besides, if at the expiration of the authority of the trustees, the right of the public over the substituted road expired also, and the proprietor of the soil might resume his authority over the surface, and close it against passengers, there is no law by which the original and diverted road could be reopened ; and therefore the public would be left without any road at all. But even if this be not so, still the 3 G. 4, c. 126, s. 4, directs, that all the provisions in that act contained shall extend to all private acts ; and therefore, in all cases of diversion since the passing of that act, the rights of the public are regulated by that which is a permanent act ; and which, by section 88, directs that when any turnpike road shall be diverted and turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be deemed and taken to be a common highway ; and then if (as it must be) the diversion was made under the General Turnpike Act, it is not necessary that a public act should be referred to in pleading, nor in any order of magistrates. [*Littledale, J.* The case, perhaps, may be imperfectly stated. There was formerly an old public highway from I. by H. to F. If the new line of road was made by the order of the commissioners of the turnpike road, under the provisions of the statute 3 G. 4, c. 126, I should not feel any difficulty ; because, by section 88, the new road is to be in lieu of the old road, and to be subject to all the regulations in any act of parliament or otherwise to which the old road was subject,

and is to be deemed and taken to be a common highway, and to be repaired and kept as such. The case then would stand thus. The road from I. to E. would be a public highway, as the road from H. to F. was, and the public would have the same rights over the one as the other. If from H. to F. was a permanent highway, and from I. to E. be also a highway, then the old road from I. to H. may be stopped up. *Parke, J.* There is nothing to show that the public have a permanent right from I. to E. The order does not show that to be the case. If it can be shown, that by act of parliament they have such right, that will be sufficient. It is not pretended that by the local act the public could have any permanent right. If the new line were made a highway under the provisions contained in section 88, of the General Turnpike Act, that ought to have been stated on the face of the order, or of the case.]

The *Solicitor-General* (and *Alderson* and *Erle* were with him), contra, was stopped by the Court.

*BAYLEY, J.* It is not necessary to give any decided opinion on the question, whether the magistrates can divert a road partially, so as to vary the line of road for carriages, but continue it for foot-passengers. It may be open to the objection, that the parish will be bound to keep two roads in repair instead of one. On the other point, it seems to me that the order is bad. When magistrates are exercising a specific authority given to them by act of parliament, they ought to show affirmatively on the face of their order that they have pursued that authority. In this case, the public are entitled to have secured to them, by the order of the magistrates, a right of using the new road co-extensive with that which they had over the old road. The road from H. to F. is described as a highway. The public had a permanent right of passage over it. I must look to the order to see whether there be a permanent right of passage reserved to the public from I. to E. The authority of the justices to give the public such a right must depend upon the act of parliament which made the road from I. to E. a turnpike road. If the act made it a turnpike road for a limited period only, it can subsist as a public road for that period only. It is described as the new line of turnpike road. Generally speaking, a turnpike road is made only for a term of years. We cannot intend, therefore, that the road from I. to E. is a public highway; that the public have permanently a right of passing over it. If a permanent right was given to the public under the local act, that ought to have been shown. So, if the road had been diverted by the commissioners under the general turnpike act 3 G. 4, c. 126, and the new line substituted, that ought to have been shown.

*LITLEDALE, J.* If the road from I. to E. had become a public highway before the act of parliament passed, the making it a turnpike road merely during the continuance of the act of parliament would not prevent its continuing a public highway. If the road from E. to F. were not a public highway when the turnpike act passed, the justices could not give a more extensive right than the public had before. If the sessions had found under what authority the new turnpike road first became a public road, we might then have known whether part of the new turnpike road could legally be substituted for the old highway. If it was first made a road under the local turnpike act, it would not be sufficient, because in that case the public would not have a permanent right of passage over it. I have considerable difficulty in saying that an old road may be diverted for carriages, and continued for foot passengers; but on that point I give no opinion.

PARKE, J. It is sufficient, in order to dispose of this order, to say, that we cannot intend that the justices had jurisdiction to stop up the road in question. I think that it ought to have been shown on the face of the order, or of the case, that the public have as good and permanent a right over the whole of the new substituted road as they had over the old. Now as by the 13 G. 3, c. 78, s. 17, justices have power to stop up an old highway only when the *new highway* shall be made, I think it ought to have been shown on the face of the order, or of the case, that the whole of the new road, substituted for the old one, was a highway over which the public have as good and permanent a right to as they had over the old one. By 13 G. 3, c. 78, s. 16, the ground purchased for the new road on payment of the purchase money, is to become a public highway. The road from I. to H., therefore, would become a highway in this case by virtue of that act. There is nothing to show that the road from I. to E., which is part of the newly substituted road, has ever become a permanent public highway. It is incumbent on the parties who seek to avail themselves of the powers given by this act of parliament, to show that the public have a permanent right to pass over the new line of turnpike road from I. and E. Now, that is not stated on the face of the order, nor is it shown that it was made a public road under the powers given to the commissioners under section 88, of the General Turnpike Act. And assuming that a turnpike road may by user become a public highway, it is not shown that there has been any user of this road by the public. As it does not, therefore, appear that the magistrates had jurisdiction to stop up the road in question, I think that the order of sessions ought to be quashed.

Order of sessions quashed.

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SYSON and Another v. JOHNSON and Others. — p. 795.

By statute 16 & 17 Car. 2, the trustees or adventurers for draining Deeping Fen were seized of 10,036 acres of land, and the rates and taxes for completing the drainage of the fen were to be levied on the 10,036 acres. They were called taxable lands. There were 5000 acres called free lands, and the other lands in the fen consisted of common land. The adventurers were at their own costs and charges to keep the river Glen with sufficient diking, roading, scouring, and banking. By a subsequent act of the 41 G. 3, reciting the former act, and that the works of drainage were insufficient, and that the owners and proprietors of free lands, and persons interested in the commons, notwithstanding their exemption from the costs of making works of drainage, together with the adventurers, being desirous to obtain a better drainage for all the said lands, and more effectually to protect the same from injury by a breach in any of the banks of the river, had agreed that the respective works of drainage thereinafter mentioned should be made, erected, maintained, and supported, at the expense of the trusts, proprietors, and persons, in the proportions thereinafter mentioned. By a subsequent clause, the commissioners under that act were thereby required well and sufficiently to enlarge, deepen, and scour out the river, and straighten the course thereof where necessary, and enlarge and straighten the banks of the river in such manner as in the judgment of the commissioners should be requisite; and the costs of executing *all* the said works were to be paid and borne by the several persons then respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons, in such proportions as the commissioners should seem just and equitable, and as they by their award should appoint, and such respective banks, after the commissioners should have completed the same, should from time to time be repaired by such persons as the commissioners should by their award direct: Held, that the adventurers were not, by this statute, released from the obligation imposed on them by the 16 & 17 Car. 2, of cleansing and scouring the river Glen.

THIS cause was tried at the Spring assizes for Lincolnshire (1827), when a verdict was taken for the plaintiffs by consent, subject to the opinion of this Court on the following case :—

The defendants are liable to the plaintiffs in the sum of 719*l.* 4*s.* 5*d.*, on account of roading and scouring the river Glen, provided the defendants are by law bound to road and scour the same. The defendants represent the body of adventurers, trustees or undertakers, who are the proprietors of 10,086 acres of land, being part of the fen commonly called Deeping Fen. By virtue of the 16 & 17 Car. 2, the trustees for draining Deeping Fen are seised of the 10,086 acres, and also of 5000 acres of the residue of the Fen to be admeasured, and which had been previously assigned to them by the commissioners of sewers. These 5000 acres are further secured to them by the 22 Car. 2. By the 16 & 17 Car. 2, the rates and taxes for completing the drainage of the fen are to be levied on the owners of 10,086 acres (called taxable lands). The 5000 acres are commonly called the free lands, and are not liable to such taxes. The remainder of the fen, amounting to about 15,000 acres, consists of commons. The river Glen commences its course from Kate's bridge, and extends fifteen miles in length to a place called the Reservoir, where it unites with the river Welland, and runs contiguous to the fens for a distance of six miles. The 16 & 17 Car. 2, contains the following provision respecting the banks encompassing the fens; and respecting the diking, roading, scouring, and banking the river :—

“And also the adventurers aforesaid shall for ever hereafter, at their own costs and charges, not only repair, exalt, maintain, and keep, as need shall require, the banks environing and encompassing the said fens, and every of them, but also the bank on the east side of the river Welland, from a place in Crowland, called Brotherhouse, to Spalding Highbridge; and also the bank on the north side of the river Glen, from Gutheran Coat to a place called Doverhurne, in Pinchbeck; and thereof, and of all and every the said banks above named, shall for ever hereafter save harmless as well the king's majesty, his heirs and successors, as the queen dowager, her tenants and under-tenants, and all other persons, their heirs and assigns, of and for their repairing and amending of their several parts and allotments of the same; but also that the said trustees, their heirs and assigns, and the survivor of them, at their own proper costs and charges, shall for ever maintain the rivers of Glen and Welland, with sufficient dyking, roading, scouring, and banking; viz. the river of Wellands, from the outgangs at the east end of East Deeping, leading unto the said fens, unto the outfall thereof into the sea, and to preserve and maintain the navigation thereof without imposition or paying anything whatever for the same, but with liberty to alter and divert the course and channel of the same into any other part or parts of the said fens, before it cometh to the said corner of Deeping fen, abutting upon Hawthorne bank, from whence, through the said town of Spalding, as it now passeth to the sea, it shall not be lawful to divert the course thereof; and with like liberty to divert the said river of Glen before it cometh to the place called Pinchbeck bars or Dovehurne, in Pinchbeck, from which place called Dovehurne, through the said town, and the town of Surfleet as it now passeth to the sea, it shall not be lawful to divert the same or prejudice the navigation thereof, and all manner of drains, sewers, and passages for waters and other waterworks whatsoever, which now are or hereafter shall be made within or without the said fens, for the draining of the said fens, or any of them which shall be necessary to be made or



continued, in order to the preserving the said fens from surrounder; and thereof, and of all and every the said rivers, to discharge, exonerate, acquit, and save harmless, as well the king's and the said queen's majesties, his heirs and successors, their tenants and under-tenants, as all other person and persons, their heirs and assigns, of and for the repairing and amending of their several parts and allotments in them and every of them."

The adventurers, by the 16 & 17 Car. 2, had power granted to them to pull up bridges, weirs, and purprestures throughout the course of the rivers Glen and Welland that might be too narrow, or otherwise hinder the course or passage of the waters, and they were to repair the ancient bridges and tunnels. By the 22 Car. 2, the adventurers may stop persons taking water from the Glen, except into the parishes of Spalding, Pinchbeck, and Weston, or into the fen called Deeping Fen, and sue them in the courts of Westminster. By the 14 G. 3, the owners of tunnels on the north-west side of the river Glen are to stop up the same after the 1st of October; and in their default the adventurers may do so; and they are to build certain bridges, (p. 170.) By the 5 G. 3, for draining and improving certain lands (not part of the fen), commonly called the Black Sluice Drainage act, the commissioners appointed by the act are to repair the north bank of the Glen from Gutheram Coat to Doverhurne, a distance of four miles, and to exonerate the adventurers of Deeping Fen from the repairs, sect. 24, 25. In 10 G. 3, c. 41, for amending the last act, are contained the following clauses respecting the roading and cleansing of the Glen:—

Section 31. "And whereas the north bank of the river Glen cannot be maintained and kept in repair as directed by the said former act, unless the waters of the said river have a free passage to the sea: Be it therefore further enacted, that it shall be lawful for the said commissioners, at any meeting convened as therein mentioned, to apply or lay out any sum or sums of money not exceeding 8000*l.*, from and out of the moneys to be raised upon the credit of the rates and taxes by this or the said former acts charged on lands in cleansing, scouring, deepening, and widening the river Glen from the sluice at the reservoir to Tongeland. S. 32. Provided nevertheless, that no such sums of money shall be so applied and laid out, unless the undertakers or adventurers of Deeping Fens shall apply and lay out an equal sum in scouring, cleansing, deepening, and widening the said river; nor unless the bridges over the said river shall be made and continued of such a width and height as the said commissioners and adventurers shall judge necessary and convenient. S. 35, Provided also, that the said river Glen, from the sluice at the reservoir to Pinchbeck bars, when scoured, cleansed, deepened, and widened as aforesaid, shall for ever thereafter be cleansed, scoured, roaded, and kept in repair by the same persons, parishes, townships, or places who are now by law obliged to scour, road, support, maintain, and keep in repair the same respectively; anything in this act contained to the contrary in anywise notwithstanding."

In the act of the 41 G. 3, are the following recitals and clauses referring to the river Glen:—"And whereas the said owners and proprietors of free lands, and persons interested in the said commons lying between the rivers Welland and Glen, although respectively entitled to be protected and indemnified against the costs and charges of such works of drainage, for draining and preserving their said lands and commons as are required to be done and maintained by the said adventurers under

the authority of the said several acts, some or one of them relating to the drainage of Deeping Fen ; yet, notwithstanding such exemption and protection, the said free land owners and commoners, together with the said adventurers and the commissioners acting under the said two acts of the fifth and tenth years of his present majesty's reign, commonly called the Black Sluice commissioners, being desirous to obtain a better drainage for all the said lands, and more effectually to protect the same from injury by a breach in any of the banks of the said river, have for those purposes agreed that the several works of drainage hereinafter directed shall be made, erected, maintained, and supported by and at the expense of the respective trusts, proprietors, and persons, and in the proportions hereinafter mentioned ; and after directing several works of drainage to be done by the adventurers, and other general works of drainage upon the rivers Welland and Glen, and divers parts of the fens to be made and supported by an equal acre-rate at the expense of the owners and proprietors of taxable and free lands in Deeping fens, and the owners of the commons between the rivers Glen and Welland, the statute proceeds as follows :—" And be it further enacted, that the said general commissioners shall, and they are hereby authorized and required well and sufficiently to enlarge, deepen, and scour out the said river Glen ; straighten the course thereof where necessary ; and enlarge and strengthen the banks of the said river from the said place called the reservoir to a certain place called Kate's bridge, of such dimensions and in such manner as in the judgment of the said general commissioners shall be requisite and necessary for the protection of the lands lying on each side thereof, and to admit the passage of the waters along the said river in times of flood with such facility as the present main bridges across the said river, and the sluice at the outfall thereof, will admit of their being discharged through the same respectively ; and shall also make or cause to be made so much of the banks of the river Welland as adjoin to any part of the lands and grounds in the several parishes and places of Tallington West, Deeping Market, Deeping, and James Deeping, or any of them ; and also of any other stream or streams of water running through the same parishes and places respectively, or through the parish of Thurlby, of such sufficient height and strength as they shall think necessary to prevent any such waters from breaking or overflowing the said banks, or any of them ; and for that purpose to take earth out of the bed of the said river Welland or other streams, or from the lands adjoining thereto respectively (making satisfaction for the same), and to remove the said banks, or any of them, as they in their discretion shall think necessary ; and that the costs, charges, and expenses of *executing all the said works* shall be paid and borne by the several persons and parties, bodies politic and corporate, now respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the said rivers Welland and Glen, in such shares and proportions as to the said general commissioners, under all circumstances, shall seem just and equitable, and as they shall in and by their award, or any writing or writings under their hands, previous to the execution thereof, order and appoint ; and such respective banks, except as hereinafter mentioned, after the said general commissioners have completed the same, shall be from time to time, and at all times thereafter, repaired, supported, maintained, and upheld of such sufficient height and strength by such person or persons, bodies politic and corporate, and subject to such regulations, orders, direc-

tions, and determination as the said general commissioners shall in and by their said award or other writing order, direct, or appoint; and the officer or officers, or other person or persons having the direction of the repairs of such bank or banks, shall from time to time, and at all times for ever, have power and be, and he and they is and are hereby empowered and required to make rates upon the several persons interested in the said Crowland and other commons lying between the said rivers, and other persons and parties, bodies politic and corporate now liable to the support and reparation of the said respective banks for the repair and preservation thereof, in such proportions as the said general commissioners shall in and by such award or other writing direct or appoint."

The adventurers always roaded, cleansed, and scoured the river until the year 1801, when the 41 G. 8 was passed, and until the same time they repaired the banks encompassing their own fen, but not any others excepting the bank from Gutheram Cote to Dovehum, previous to the Black Sluice Drainage Acts; and it was proved that the adventurers occasionally roaded the river between 1806 and 1817, and that the commissioners under the act of the 41 G. 8, during the same period, also occasionally roaded the river. The commissioners, for executing that act, by their award, dated 25th March, 1819, awarded as follows: "We the said general commissioners do also certify and declare, that in observance of the directions in the said in part recited act contained, and in further execution thereof, we caused the river Glen to be enlarged, deepened, and scoured out, and straightened its course in several parts, and enlarged and strengthened the banks thereof; and that for defraying the costs incurred thereby, the same was borne and paid by the several persons and parties, bodies politic and corporate, who were, at the time of passing the said in part recited act, respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the rivers Welland and Glen; and a rate or assessment for raising the sum of 5000*l.* towards effecting the said works was made, and subsequently thereto, other rates were made for raising further sums for the like purpose from the same persons and parties, and in the like shares and proportions they were respectively made liable by the first rate or assessment, to the extent in the whole (including such first rate or assessment) of 27,500*l.*; and the moneys received in payment of all such several rates and assessments have been paid, laid out, and expended, as well in the execution of the said works, as in lowering the tunnel lying under the river Glen, by which certain lands, called Bourne South Fen Pastures, and Thurlby Fen Pastures, were theretofore drained; and we do by this our award declare, that the said works so executed on the said river Glen (except the said tunnel, and also except such parts and proportions of the said banks as are in and by the said recited act directed to be supported and maintained by the Black Sluice Drainage commissioners, and the trustees of the Bourne Eau Navigation respectively), shall from time to time, and at all times hereafter, be repaired, supported, maintained, and upheld, by the several persons, bodies politic and corporate, respectively liable thereto, in the several proportions following, viz: For every sum of 897*l.* 5*s.* required from time to time to be raised and levied for the purpose of such repairs, and so in proportion for any greater or less sum, such rate or assessment shall be raised, borne, paid, and defrayed by the several persons, bodies politic and corporate, in respect of their several lands and hereditaments, that

were charged with the making and executing the said works in the several proportions following." The proportions were then set out.

The question for the opinion of the Court was, Whether the liability of the adventurers of Deeping Fen to road and scour the river Glen, imposed by the 16 & 17 Car. 2, is taken away by the provisions of the 41 G. 3, and the award thereupon?

*Amos*, for the plaintiff. The adventurers of Deeping Fen are charged by the statute of Charles the Second to road and cleanse the river Glen for all future time. The distinction between the obligation to cleanse the river and to repair the banks is clearly marked, and strongly expressed by that statute. The adventurers are thereby required to road the river for a space of fifteen miles, but to repair the banks only for a space of six. The adventurers received by the statute a very large grant of land, which was an adequate remuneration for their liability. Then is the liability of the adventurers taken away by the 41 G. 3? The enacting part of that statute contains two provisions; the first of a temporary, the second of a permanent nature. That the first is a temporary provision only, is manifest from its language, particularly as contrasted with the language of the second provision. And, indeed, if the operation of the first part was permanent, there would be no occasion for the subsequent clause. Moreover it was reasonable that the proprietors of the banks along the river, as well as the adventurers, should contribute on a particular occasion, where the object was to deepen, as well as to scour the river, and where the adjacent banks would derive material advantage from the process. But this reason would not be sufficient to discharge the adventurers from the statutory liability of cleansing the river from time to time, for which they had received a very adequate consideration. The act of the 10 G. 3, shows that in the history of the river it has not been unusual to make parties contributory to the deepening of the river on a particular occasion, without discharging the permanent liability imposed on the adventurers of roading the river. Again, it appears from the acts stated in the case, that the roading of the river is incidental to the maintaining of the navigation, with which the adventurers are charged; but the statute of the 41 G. 3 was passed for purposes wholly alien to the maintenance of the navigation of the Glen. And by the common law the cleansing of rivers is a charge on the persons to whom the navigation belongs, and not on the owners of the adjacent banks, 18 Rep. 12. With respect to the agreement contained in the recital of the act, several persons now sought to be charged were not parties to it; besides its operation is fully exhausted by the works of drainage afterwards in the act directed to be made, and to be executed in the proportions mentioned in the act; whereas nothing is said as to the proportions with which any parties are to be charged for cleansing the river. But in any other view of the agreement, it must be construed *reddendo singula singulis*, and not that everything which was directed to be executed at the expense of any individuals, should likewise be supported at the expense of the same individuals. Lastly, the award of the commissioners cannot affect the question if they have exceeded their jurisdiction; which they have clearly done, by reading the word "*banks*" in the act as though it were "*works*," and applying the provisions respecting their "*height*" and "*strength*" to other works to which, from their language, as well as for the reasons before insisted on, they are obviously inapplicable.

*Fynes Clinton*, contra. The statute of Car. 2, undoubtedly threw on the adventurers the burden of scouring and cleansing the river Glen.

It must be conceded that they continue liable unless they are released from that obligation by the 41 G. 8. That statute recites the former acts for draining the fens, and that the works of drainage were insufficient, and that the owners of free land, and persons interested in the commons lying between the two rivers Welland and Glen, together with the adventurers and the Black Sluice commissioners, being desirous to obtain a better drainage for all the said lands, and more effectually to protect the same from injury by a breach in any of the *banks* of the said river head, for those purposes agreed that the several works of drainage thereafter directed should be made, erected, *maintained, and supported* at the expense of the persons thereafter mentioned. The recital, therefore, shows clearly that the legislature intended to provide for the maintaining and supporting as well as making the works of drainage. The cleansing and scouring the river is a work of drainage. Then a subsequent clause of the act directs the several works of drainage to be made. The commissioners are to enlarge, deepen, and scour out the river Glen, straighten the course thereof, and strengthen the banks thereof, &c. &c.; and the costs of executing all the said works are to be borne by the persons then liable to the repairs of the banks, in conjunction with the owners interested in the drainage of the commons, in such proportions as the commissioners shall award. The expense, therefore, of scouring the river is to be borne, in this one instance, not by the adventurers only, but by all persons liable to repair the banks, jointly with the owners of the commons. The act then goes on to provide that the *banks*, when completed, shall be repaired by such persons as the commissioners shall direct. It is true that this clause does not in terms provide for the repairing of the other works of drainage; but in order to satisfy the intention of the legislature that all the works of drainage contemplated in the recital should be maintained and supported, the word *banks* must be construed to mean *works*; and the consequence of that will be, that all the works of drainage must be repaired, supported, maintained, and upheld from time to time, by the persons liable thereto, in the proportions directed by the commissioners. That is the construction put upon the act by the commissioners in their award. It is said that all the words of the recital are satisfied by the works of drainage thereafter directed to be made and executed, and the banks thereafter directed to be maintained and supported; but the recital applies to all the banks; the enactment applies only to the banks completed by the commissioners under that act. The provisions referred to, therefore, do not satisfy the recital. Assuming that there are no express words to exonerate the adventurers from the burthen of cleansing and scouring the river, they are exempted by necessary implication. By the act, the banks may be enlarged and the river deepened. If the adventurers are liable to cleanse and scour the river so deepened, a greater burthen will be thereby cast upon them than they were liable to before. That never could have been the intention of the legislature.

BAYLEY, J. The act of the 41 G. 8 recites the former acts, and that the then works of drainage were insufficient, and that the owners and proprietors of free lands, and persons interested in the commons lying between the rivers Glen and Welland, although entitled to be protected and indemnified against the costs of such works of drainage, for draining and preserving the said lands and commons, as are required to be done and maintained by the adventurers under the several acts (therein recited)

relating to the drainage of Deeping fen, yet, notwithstanding such exemption, the said land owners and commoners, together with the adventurers and the commissioners acting under the two acts of the 5 & 10 G. 3, being desirous to obtain a *better* drainage, and more effectually to protect the same, had agreed that the several works of drainage thereafter directed should be made, erected, maintained, and supported by and at the expense of the respective trusts, proprietors, and persons, and in the proportions thereafter mentioned. Then we are to look to the subsequent clause to see what the works of drainage are, which are directed to be made, maintained, and supported at the costs of the persons thereafter mentioned. The general commissioners are required well and sufficiently to enlarge, deepen, and scour out the river Glen, straighten the course thereof where necessary, and enlarge and strengthen the banks of the river from the reservoir to Kates bridge; and also to make or cause to be made, so much of the banks of the river Welland as adjoin to any part of the lands and grounds in the parishes and places therein described; and also of any other streams of water running through the same parishes and places, of such sufficient height and strength as they shall think necessary to prevent any such waters from breaking or overflowing the said banks, or any of them; and the costs of executing *all* the said works are to be paid and borne by the several persons and parties *then* respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the rivers Welland and Glen, in such proportions as the said general commissioners shall, by their award, appoint." That act gives to the commissioners the power of deciding in what proportion the costs of executing *all* the said works shall be borne by the persons therein mentioned. The language of the act is then varied: it goes on to state, "and such respective banks, after the said general commissioners have completed the same, shall be from time to time repaired, supported, and maintained of such sufficient height and strength by such persons, &c., and subject to such regulations as the said general commissioners shall by their award direct." In the early part of this very section, the general commissioners were authorised to enlarge, deepen, and scour out the river Glen; but in this part the section gives directions only as to how the *banks* are to be repaired, supported, and maintained. It is silent as to scouring and cleansing the Glen. It goes on to say, "and the officer or other person having the direction of the repairs of such banks shall have power, from time to time, to make rates upon the several persons interested in the said Crowland and other commons lying between the said rivers, and other persons now liable to the support and reparation of the said respective banks, for the repair and preservation thereof, in such proportions as the said general commissioners shall, by their award, appoint." There is, obviously, in that clause, a variation in the language used with reference to the works to be executed in the first instance, and the banks which are to be permanently repaired thereafter. The expense of executing all the works is to be borne by the persons therein mentioned, in the proportion directed by the commissioners. But the permanent repair of the banks is to be borne from time to time by the persons therein mentioned, in the proportions directed by the commissioners. There is no provision for the cleansing and scouring the river from time to time, or for maintaining any other work of drainage. I cannot say that there is clear and distinct language to show that the adventurers are exonerated from the charges

of cleansing and scouring the river, to which they were liable by the statute of Car. 2. There are no words expressly exempting them from that obligation, and there is nothing in the act which exempts them by necessary implication; and not being exempted by express words, or by necessary implication, I am of opinion that they continue liable.

LITLEDALE, J. It is conceded, that if the adventurers are not released by the act of the 41 G. 3, from the obligation to cleanse and scour the river Glen, they are liable. The question is, Whether it appears from the recital, coupled with the enacting clauses, that it was intended to release them from that obligation? It appears by the recital, that the land owners, commoners, adventurers, and commissioners acting under the two acts of the 6 & 10 G. 3, being desirous to obtain a better drainage for all the lands, had for those purposes, agreed, that the several works of drainage thereafter directed should be made, erected, maintained, and supported at the expense of the respective trusts, proprietors, and persons, and in the proportions thereafter mentioned. All that can be inferred from this recital is, that some direction was to be given in a subsequent part of the act, as to the making and maintaining of these works of drainage: it is not to be thence inferred, that those who made, should afterwards maintain them. In the subsequent clause, which contains this direction, there is an important difference between executing and maintaining. That clause enacts, "that the costs of executing *all* the said works of drainage are to be paid by the several persons respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons lying between the two rivers, in such proportions as to the said commissioners shall seem just, and as they shall by their award appoint; but the banks, after the said general commissioners have completed the same, are to be from time to time repaired, supported, and maintained by such persons as the said general commissioners shall by their award order and appoint." There is an important difference between the language of the different branches of this clause. In the first part of the clause, the costs of executing *all* the works are directed to be borne by the persons therein mentioned; but, in the second, the expense of repairing *the banks* from time to time, not of *repairing all the works of drainage*, is directed to be borne by such persons and in such proportions as the commissioners shall direct. The introduction of the word *all* shows a manifest intention to make a distinction between the expense of making and maintaining the works of drainage. The legislature provides for the expense of executing *all* the works of drainage contemplated by the act; but it provides only for the expense of repairing, from time to time, the banks, but not for the expense of cleansing and scouring, from time to time, the river. That being so, I think that, according to the true construction of this act of parliament, the adventurers remain liable to cleanse and scour the river Glen.

PARKE, J. The plaintiffs are entitled to a verdict, if the defendants, who represent the body of adventurers, be liable to cleanse and scour the river Glen. The statute of the 16 & 17 Car. 2 imposes upon them the duty of roading and scouring the river Glen. The statute 10 G. 3, which is drawn with more caution than the 41 G. 3, expressly provides for their continuing liable to discharge that duty. The question is, Whether that duty, which clearly rested with them at the time of passing the last mentioned act, was thereby taken away? That act, after reciting the former acts, and that the works of drainage were insufficient, and that it had

been agreed that the several works of drainage, thereafter directed to be made, should be made, erected, maintained, and supported by and at the expense of the persons thereafter mentioned, directs certain works, once for all, to be done to improve the condition of the river Glen. It then provides for payment of the expense of making all those works by all the persons therein mentioned, in the proportions fixed by the commissioners. But the banks are to be repaired from time to time by such persons as the commissioners shall direct. There is no permanent provision but for maintaining the banks. It has been said, that the recital must control the enacting clause; but the recital is not inconsistent with the subsequent enactments. It must be construed, *reddendo singula singulis*. The effect of the statute then will be, "that the costs of the improvements must be borne by the adventurers, the proprietors of the commons and free land; and that the repairs of the banks, when completed, must be borne from time to time by such persons, as the commissioners shall direct; but the repairs of the other works of drainage must be borne by the persons who were before liable to make those repairs. There is no permanent provision for the expense of cleansing and scouring the river: the adventurers, before the passing of that act, were bound to bear that expense, and they must, therefore, continue liable to that charge. The plaintiffs are, therefore, entitled to judgment.

Judgment for the plaintiffs.

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DOE, dem. WARREN, v. AARON BRAY. — p. 813.

An entry in the register-book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not admissible in evidence, nor is the private memorandum of the fact made by the clerk, who was present at the baptism.

**EJECTMENT.** At the trial, before *Vaughan, B.*, at the Spring assizes for the county of Worcester, 1828, the question was, Whether the defendant, Aaron Bray, was the legitimate son of his father. On the part of the defendant, among other evidence, the register-book of baptisms of the parish of Castlemorton, in the county of Worcester, for the year 1776, was produced; and it contained an entry of baptism of Aaron, the son of John Bray, and Elizabeth his wife, on the 6th of February, 1776. It appeared, on cross-examination of the witness, that the entry was in the hand-writing of the Rev. Dr. Smith, and that he did not become minister of the parish till the year 1777; that, during the years 1775 and 1776, the then incumbent of the parish was very infirm; and that the then clerk, who continued in office for several years afterwards, entered on slips of paper an account of the baptisms, &c.; and his memoranda, which had been preserved, were produced, and there was no doubt that Mr. Smith had made from them the entries in the register-book. It was objected under the circumstances, that neither the register nor the memoranda made by the clerk were admissible in evidence. The learned Judge received them. A verdict having been found for the defendant, a rule nisi for a new trial had been obtained, on the ground, that the evidence ought not to have been received.



*Campbell* and *R. V. Richards* now showed cause. The register was properly received in evidence. The clerk, who must have been present at the baptism, made an entry on paper which was afterwards copied into the register-book by the incumbent of the parish. It is true, he was not incumbent at the time when the christening took place; but the clerk, who originally made the minute of the fact, continued in office after he became incumbent. The register was *prima facie* evidence, and ought to have been falsified. Suppose an incumbent, after baptising an infant, to die before he makes an entry in the register-book, and that another clergyman, present at the christening, succeeded to the church and made the entry, that would be good evidence. The register is not falsified, therefore, by merely showing that the entry was made by a clergyman, who, at the time of the baptism, was not the minister of the parish. But if the register was falsified, by showing that the entry was made by Mr. Smith after he became minister of the parish, it was set up again as a good register, by showing the source from which the entry itself was taken. [*Bayley, J.* The memoranda would not be evidence. In *Newman v. Raithby*, 1 Phill. 15, copies of the register of a dissenting chapel were not allowed to be pleaded in evidence, on the ground that they were not copies of public documents which were in official custody. And if the private memoranda of the clerk not made in the register-book would not be evidence, how can an entry made from them into the register-book be evidence? In the case of *May v. May*, 2 Str. 1072, cited 3 Burn, 299, the question arose on the plaintiff's legitimacy; and on his part a general parish register was produced, in which there was an entry of his christening, describing him in the same manner as legitimate children were usually entered. It appeared that the practice was, to make entries in the register once in three weeks, out of a day-book, in which entries were made immediately after the christening on the same morning; and in the case of illegitimate children, to insert in the entry the letters B. B., which were intended to signify "base-born." The defendant's counsel then offered in evidence the day-book from which the other entry was posted, and in which the letters B. B. were inserted, insisting that it was the original entry. But a majority of the judges present, at a trial at bar, were of opinion that such evidence ought not to be received, on the ground that there could not be two registers in the parish, and that the one first produced ought to be taken to be the true register."] In that case the register had been completed; but in this case it is contended by the plaintiff, that the proper register never has been perfected, and if that be so, and the memoranda be received in evidence, there will not be two registers. If the entry in the register-book be admissible, it will be sufficient. [*Littledale, J.* By the 70th canon, 3 Burn's E. L. 290, the names of all persons christened are required to be entered in the register-book at the end of every week. *Parke, J.* One ground why a register is evidence is, because it is made by a person who has a public duty to perform. Here the register is made up by a person, who, as far as this baptism was concerned, was a perfect stranger to the transaction. He had no connection with the parish at the time when the baptism took place.] Suppose the entry to have been made in the register-book by the clerk during the lifetime of the first incumbent, it surely would have been admissible in evidence? [*Bayley, J.* In that case it might be presumed, that the clerk was authorised by the minister to make the entry, and then 't would be the act of the minister; but we cannot presume that an entry made after his death was made by his direction.] *Cur. adv. vult.*

BATLEY, J. There must be a new trial in this case. The register ought not to have been received in evidence. Registers should be made up promptly, and by the person whose duty it is to make them up. The register of baptism, in this case, purports to bear date the 6th of February, 1776, but it was not made up till June, 1777, and then it was made up, —not by the person who was minister of the parish at the time of the baptism, or by a person who appeared at that time to have any connection with the parish,—but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of the minister of the parish who was present at this baptism. He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk. I think, therefore, the register itself clearly ought not to have been received in evidence. But, then, supposing there was no register, it has been said that the clerk's memoranda were admissible evidence to prove all the facts that could be proved by the register. It was not his duty to make such memoranda: they are mere private entries. *May v. May*, to which I referred during the argument, shows that a day-book, from which the entries in a register were made, is not admissible in evidence. The editor of Burn's Eccl. Law, after stating that case in vol. iii. p. 293, makes the following observation:—"If, indeed, the entry in the day-book, representing the plaintiff as illegitimate, had been signed by the reputed father or the mother, or made under their direction, such evidence would have been admissible as the declaration of a deceased parent on a question of legitimacy; for the declarations of deceased persons, supposed to have been married, (who might themselves be examined, if alive,) are admissible to disprove the fact of marriage, *Rex v. Bramley*, 6 T. R. 330; but if, on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum, kept for the purpose of assisting the clerk to make up the register, (and of that nature it seems here to have been considered,) in that case it should not be received as the original authenticated entry." The editor, therefore, thought that the entry in the day-book would not be receivable in evidence in the character of a register; but that if it had been signed by the reputed father and mother, it might have been received as a declaration of the deceased parents. In the case of *Newham v. Raithby*, 1 Phill. 315, the copies of the register of a dissenting chapel were not allowed to be pleaded in evidence in the ecclesiastical court, on the ground that they were mere private memoranda, and not copies of public documents, which are in official custody. So, in this case, the entries made by the clerk were mere private memoranda. They were not, therefore, admissible in evidence. The rule for a new trial must be made absolute.

Rule absolute for a new trial.

END OF MICHAELMAS TERM.



# AN INDEX

TO

## THE PRINCIPAL MATTERS.

### ABATEMENT.

*See* PRACTICE, 15.

### ADMINISTRATOR.

*See* EXECUTOR, 1. LIMITATIONS, STATUTE OF, 1, 2. PLEADING, 5.

### ADVERSE POSSESSION.

*See* EJECTMENT, 5.

### AFFIDAVIT OF DEBT.

*See* PRACTICE, 15, 17.

### ALIEN.

*See* JUROR.

### APPEAL.

1. On the hearing of an appeal against a poor-rate, the sessions have no jurisdiction to quash the rate for a defect appearing on the face of the writ itself, unless that defect be specified in the notice as a cause of appeal. *Rez v. The Inhabitants of Bromyard*, E. 9 G. 4. Page 240
2. The 17 G. 2, c. 38, s. 4, does not make it imperative on the justices to hear and determine an appeal at the sessions next following the publication of the rate, but they may adjourn it to the next sessions. Where a rate was published on the 16th of September and the appeal was entered at the Michaelmas sessions, but the defendant did not give notice of his intention to try his appeal at those sessions, and the justices adjourned it as a matter of course to the Epiphany sessions, according to the usual practice, and the appellant gave notice of his intention to try his appeal at the Epiphany sessions, the justices refused at that sessions to hear it, on the ground that it ought to have been heard and determined at the preceding sessions, this Court granted a mandamus to compel them to hear the appeal. *Rez v. The Justices of Wilts*, T. 9 G. 4. 380
3. By the statute 4 G. 4, c. 95, s. 87, a right of appeal is given in certain cases, if the party gives notice within six days after the cause of complaint arises. Two justices having

made an order upon the surveyors of the roads in a township to perform a certain part of the statute duty on a turnpike road, running through the township, and to pay to the surveyor of that road a certain part of the money received as a composition for statute duty: *Held*, that the cause of complaint did not arise until a copy of the order in writing had been served, and that notice of appeal given within six days from that time was valid. *Rez v. The Justices of Lancashire*, M. 9 G. 4. 593

4. *Seem*, that it is unnecessary to enter and respite an appeal at the next sessions, where the order of removal is served so late as to render it impossible to try the appeal at those sessions. *Rez v. The Justices of Kent*, M. 9 G. 4. 639

5. An order of removal was served too late to enable the parish to which the pauper was removed to try an appeal at the next sessions; but it might have been entered and respited at those sessions: *Held*, that that was unnecessary, and that, due notice of the intention to prosecute the appeal at the second sessions having been given, the court of quarter sessions were bound to hear and determine it. *Rez v. The Justices of Devon*, M. 9 G. 4. 640

### ARBITRAMENT.

*See* EVIDENCE, 5.

One of two partners gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit:" *Held*, that this gave the son power to submit the accounts to arbitration. *Hendley v. Soper*, E. 9 G. 4. 16

### ARREST.

Where, by the contrivance of plaintiff's attorney, a party had been arrested on a Sunday on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till Monday, and then arrested on the civil process, the Court ordered him to be discharged out of custody. *Quare*, Whether a party can be arrested a third time for the same cause of action? *Wells v. Gurney*, M. 9 G. 4. 769

**ASSIGNMENT.***See* COVENANT, 1.**ASSUMPSIT.**

1. Where A. and B. deposited money in the hands of a stake-holder, to abide the event of a boxing-match between them; and after the battle A. claimed the whole sum from the stake-holder, and threatened him with an action if he paid it over to B., which he nevertheless did by the direction of the umpire: *Held*, that A. was entitled to recover from him his own stake, as money had and received to his use. *Hastelow v. Jackson*, E. 9 G. 4. 221
2. A., having a patent for certain spinning machinery, received an order from B. to have some spinning-frames made for him. A. employed C. to make the machines for B., and informed the latter that he had so done. After the machines had been completed, A. ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for B., and C. informed B. that they were ready, but he refused to accept them: *Held*, that C. could not recover the price from B. in an action for goods bargained and sold, or for work and labour, and materials. *Atkinson and Others, Assignees, v. Bell and Others*, E. 9 G. 4. 277
3. Where A., at the request of B., entered into a bond with him and C. to indemnify D. against certain debts due from C. and D., and B. promised to save A. harmless from all loss by reason of the bond: *Held*, that this promise was binding although not in writing, and that A. might recover from B. the whole of the moneys which he was compelled to pay by virtue of the bond. *Thomas v. Cook*, M. 9 G. 4. 728

**ATTACHMENT.***See* EVIDENCE, 5.**ATTORNEY.**

1. The court will not compel an attorney to pay a sum of money he has received in his character of attorney; he having after the receipt of the money become bankrupt and obtained his certificate. *Ex parte Culliford v. Warren, Gent., one, &c.* E. 9 G. 4. 220
2. Where a judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the master. *Jay, Gent., one, &c. v. Coaks*, M. 9 G. 4. 635

**BANKRUPT.***See* ATTORNEY.

2. A. kept cash with M. and Co., bankers, and accepted a bill drawn by one of the partners in the house of M. and Co., and indorsed by that partner to M. and Co., who discounted it, and afterwards indorsed it for value to S. Before the bill became due, M. and Co. became bankrupts, having funds in the hands of S. more than sufficient to pay

the bill, and having in their hands money belonging to A. When the bill became due, S. presented it for payment to A., who having refused payment, S. paid himself the amount out of the funds of M. and Co. remaining in his hands, and delivered the bill to their assignees: *Held*, in an action brought by the assignees against A. as acceptor of the bill, that there had been, before the bankruptcy, a mutual credit between the bankrupts and A.; and that the latter was entitled to set off, against the sum due to the bankrupts on the bill, the debt due to him from M. and Co. at the time of their bankruptcy. *Bolland and Others, Assignees, v. Nash*, E. 9 G. 4. 105

2. Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a fi. fa., under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution creditor: *Held*, that he was not justified in paying over the money, and was liable to be sued for it by the assignees in an action for money had and received.

*Quare*, whether the sheriff was justified in selling the goods after notice of the bankruptcy. *Notley and Others, Assignees, v. Buck*, E. 9 G. 4. 160

3. Where a party committed by commissioners of bankrupt, for not answering to their satisfaction, wishes to be again brought before them, he must bear the expense of that proceeding. *Ex parte Baxter*, T. 9 G. 4. 344
4. In August 1821, A., a trader, being indebted to B. and C., then in partnership, but about to separate, gave a warrant of attorney to secure payment by instalments to B. alone, who knew that A. was then insolvent. In October A. committed an act of bankruptcy, and in November, at B's desire, he sent goods to the warehouse of B. and C. as a further security for the debt. In December B. and C. dissolved partnership; and the former afterwards received from A. several sums of money on account of the warrant of attorney, and also sold the goods, towards satisfaction of the debt. A commission of bankrupt issued against A. in January 1823, and in November of that year B. died: *Held*, that A.'s assignees might recover from C. the money paid by A. on the warrant of attorney, by an action for money had and received, and for value of the goods, by an action of trover. *Biggs and Others, Assignees of Collier, v. Follows*, T. 9 G. 4. 402

5. A creditor had obtained judgment by default against his debtor since the statute 6 G. 4. c. 16, s. 108, and the goods having been seized by the sheriff before, but not until after an act of bankruptcy was committed by the debtor, the court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. *In re Washbourn*, T. 9 G. 4. 444

6. A. and Co., as brokers for B., sold goods then in their possession to C., which were paid for by a bill drawn by C. and accepted by D. C. ordered A. and Co. to keep the goods in their hands, and sell them if they could make a certain profit. Before the bill became due, D. failed, and A. and Co. applied to C. for security for the bill, and he gave them an order to sell the goods and apply the proceeds in payment of the bill. C. afterwards, and before the goods were sold, became bankrupt. A. and Co. handed over the goods to B., at his request, but he afterwards returned them; and after they were returned, C.'s assignees, having made a demand of the goods, brought trover: *Held*, that they could not maintain it, for that, after the order given by C. to A. and Co. to sell the goods and apply the proceeds in payment of the bill, they remained in their hands subject to that charge; because A. and Co. must be presumed to have asked security as agents for B., whose ratification of their act for his benefit might also be inferred. *Bailey v. Calverwell*, T. 9, G. 4. 448

7. A., B. and C., together with others, were part-owners of a ship engaged in the whale fishery. The usual mode of managing the cargo was, that, on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of B. and sold by him, and the proceeds were applied in part of discharge of the expenses of the ship. The blubber was deposited in a warehouse rented of C. by the owners of the ship, and the oil produced from it was then put into casks, each owner's share being weighed out and placed separately in the warehouse, in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid. In that case the warehouseman used to detain the oil till the ship's husband's demand had been satisfied. The ship having arrived from her voyage in 1825, the above course was followed. The share weighed out and set apart for A. was twenty-nine tons, which was stowed in the warehouse in casks, and which had A.'s initials put on them. In January, 1826, A. became bankrupt: twenty tons of the oil had been delivered to A. before his bankruptcy; the remaining nine tons remained in the warehouse at the time of the bankruptcy. In January 1826, the warehouseman had orders from C., the ship's husband, not to deliver to A. the remaining oil, as his share of the disbursements of the ship had not been paid: *Held*, in an action of trover brought by the assignees of A. against C. for the residue of A.'s oil, that the other part-owners had originally a lien on it for his share of the disbursements of the ship; and that this right was not divested by the separation of A.'s share from the residue, and placing it in casks marked with his name. *Holderness and Another, Assignees, v. Shackell*, M. 9, G. 4. 612

\* Where the assignees of a bankrupt enter

the premises of a third person, to seize goods which were the property of the bankrupt, it is not necessary that an action against them, should be brought within three months after the fact committed, the act of the assignees not being done "in pursuance of the statute," within the meaning of the 6 G. 5, c. 16, s. 44. *Edge v. Parker*, M. 9, G. 4. 697

9. Judgment was entered up on a warrant of attorney given by two joint-traders, and a fi. fa. issued, returnable on the 2d of May. On the first of that month, the sheriff's officer, received from the defendants the money directed to be levied. On the 2d of May one of them committed an act of bankruptcy and the other on the 5th. On the 11th a commission of bankrupt issued, and on the 19th the sheriff paid over the money to the execution-creditor. In an action by the assignees: *Held*, that he was entitled to retain it, not being a creditor having security at the time of the bankruptcy. *Morland v. Pellatt*, M. 9, G. 4. 722

## BAPTISM.

See EVIDENCE, 26.

## BERWICK-UPON-TWEED.

See RATE.

## BILL OF EXCHANGE.

See EVIDENCE, 9.

1. To an action upon a joint and several promissory note of A. and B., the latter being a mere surety, brought by payee against the administrator of B., the defendant pleaded that the cause of action did not accrue within six years, upon which the plaintiff took issue. The plaintiffs proved, that within six years, and during the lifetime of B., A. made a payment on account of the note; B. afterwards died: *Held*, that such payment operated as a new promise by B. to pay according to the nature of the instruments, and that his administrator was liable on the note. *Burlingh and Others, Executors, v. Stott, Administratrix*, E. 9, G. 4. 36
2. A. kept cash with M. and Co., bankers, and accepted a bill drawn by one of the partners in the house of M. and Co., and indorsed by that partner to M. and Co. who discounted it, and afterwards indorsed it for value to S. Before the bill became due, M. and Co. became bankrupts, having funds in the hands of S. more than sufficient to pay the bill, and having in their hands money belonging to A. When the bill became due, S. presented it for payment to A., who having refused payment, S. paid himself the amount out of the funds of M. and Co. remaining in his hands, and delivered the bill to their assignees: *Held*, in an action brought by the assignees against A. as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and A.; and that the latter was entitled to set off, against the sum due to the bankrupts on the bill, the debt due to him from M. and Co. at the time of their

- bankruptcy. *Bolland and Others, Assignees, v. Nash*, E. 9, G. 4. 105
3. A member of a joint-stock company was employed by the company as their agent to sell goods for them, and received a commission of two *per cent.* for his trouble, and *one per cent. del credere* for guaranteeing the purchaser. Having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his, the drawer's own order, and after it had been accepted, he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company: the company were then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10*s.* in the pound upon the amount of the bill by way of composition: *Held*, first, that the indorsee, being a member of the company, could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company; and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account. *Teague v. Hubbard*, T. 9 G. 4. 345
  4. The indorsee of a bill of exchange dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to him and the other prior indorsers; the attorney, after inquiry, having received information of this indorser's place of residence, on the following day consulted his client, and on the third day sent notice of the dishonour of the bill: *Held*, that the notice was sufficient. *Frith v. Thrush*, T. 9, G. 4. 387
  5. In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him. For the defendant it was stated, that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer; that it was indorsed and delivered to the acceptor, in order that he might get it discounted; and that he delivered it to the plaintiff upon condition, that if he procured cash for it, he might retain out of it the amount of the debt due to him from the acceptor; but that he never did get cash for the bill: *Held*, that the acceptor could not be examined to prove these facts; for, although he was uninterested as to the amount sought to be recovered on the bill, he was interested as to the costs, against which he would have to indemnify the defendant if the plaintiff obtained a verdict. *Edmonds v. Lowe*, T. 9, G. 4. 407
  6. A bill of exchange was drawn by A. upon B. for the accommodation of C., who indorsed it for value to D. Neither A. nor C. had any effects in the hands of B. The bill was dishonoured by B. *Held*, that the drawer was entitled to notice. *Norton v. Pickering*, M. 9, G. 4. 610
  7. A bill of exchange drawn in America, on a house in London, payable to order, was indorsed by the payee generally to A., and by him in these words: "Pay to B. or his order for my use." B. applied to his bankers to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of B.: *Held*, that the indorsement was restrictive; that the property in the bill remained in A., and that he was entitled to recover the amount of the bill from the bankers. *Sigourney v. Lloyd and Others*, M. 9, G. 4. 622
- ## BILL OF MIDDLESEX.
- See PLEADING, 11.
- ## BOND.
- See SIMONY.
1. In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money. *Whitnash and Another v. George and Another*, M. 9, G. 4. 556
  2. The condition of a bond recited, that A. was indebted to B. in various sums of money, which were all stated in pounds sterling, and money of a smaller denomination, and that the bond was given to secure payment of those sums. In the obligatory part of the bond the word *pounds* was omitted; it merely stated, that the obligor became bound in 7700 without stating what description of money: *Held*, that from the condition the intent manifestly was, that the obligor should become bound in 7700 *pounds*, and that the word *pounds* might therefore be supplied. *Cole, Administrator, v. Hulme*, M. 9, G. 4. 568
  3. Where A., at the request of B., entered into a bond with him and C. to indemnify D. against certain debts due from C. and D., and B. promised to save A. harmless from all loss by reason of the bond: *Held*, that this promise was binding although not in writing, and that A. might recover from B. the whole of the moneys which he was compelled to pay by virtue of the bond. *Thomas v. Cook*, M. 9 G. 4. 726
- ## BRIDGE.
- See INDICTMENT, 2.
- ## BROKER.
- See TROVER, 2.
- ## BURIAL.
- Where a rector granted to A. B., by parol, leave, to make a vault in the parish church, and to bury a certain corpse there, and that he should have the exclusive use of the vault; and afterwards, without the leave of A. B., opened the vault and buried another person there: *Held*, that no action could be maintained against him for so doing; for that, if the rector had power to grant the

exclusive use of a vault, he could not do it by parol.

*See* *Semble*, That a rector cannot grant a vault in the church, but only leave to bury there in each particular instance. *Bryan v. Whistler, Clark, E. 9 G. 4.* 288

# CERTIORARI.

*See* *INDICTMENT, 3. PRACTICE, 4.*

# CHALLENGE.

*See* *JUROR.*

# CHARTER.

*See* *CORPORATION, 4.*

# CHARTER-PARTY.

Where the owner of a ship, by an instrument called a charter-party, appointed G. B. to the command, and agreed that, the ship being tight, &c., and manned with thirty-five men, G. B. should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons, to be laden for account of the owner), and proceed therewith to Calcutta, and there reload the ship with a cargo of East India produce, and return therewith to London; and upon her arrival there and discharges, the intended voyage and service should end. And the owner further agreed, that the complement of thirty-five men should, if possible, be kept up; that he would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage. In consideration of which, G. B. agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage; and pay to the owner for the use and hire of the ship after the rate of 25*s.* per ton per month, of which 1000*l.* was to be paid on the execution of the charter-party, and 2000*l.* by two approved bills on Calcutta, one of which was to be payable one month, and the other two months, after her arrival there; the residue to be paid or secured to the satisfaction of the owner on the arrival of the ship at London, and previous to commencing the discharge of her homeward cargo. (Certain other stipulations for payment of freight, if the ship were detained in India, were then made.) And it was further agreed, that G. B. should remit all freight-bills for the homeward cargo to B. B. and Co. in London, who should hold them as joint trustees for the owner and G. B.; that they should first be applied to the payment of the balance of freight due from G. B., and the surplus, if any, be handed over to him. It was then provided, that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander. C. and Co. in Calcutta, having knowledge of this instrument, shipped goods on board the vessel for London, which were never deli-

vered there. *Held*, that they might recover against the owner, notwithstanding the agreement between him and G. B.; for that it was in the nature of a special appointment of the latter to the command, and was not a charter of the vessel to him. *Colvin v. Newberry, E. 9 G. 4.* 166

# CHOSE IN ACTION.

The general rule of law is, that a debt cannot be assigned. The exception to that rule is, that where there is a defined and ascertained debt due from A. to B., and a debt to the same, or a larger amount due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B., the latter may maintain an action against C. But in such action it is incumbent to show, that, at the time when C. promised to pay B., there was an ascertained debt due from A. to B. *Fairlie v. Denton and Another, T. 9 G. 4.* 395

# CHURCH.

*See* *BURIAL.*

# CHURCHWARDEN.

*See* *MANDAMUS, 2.*

# COLLECTOR.

*See* *DISTRESS, 3.*

A local act for enlarging, cleansing, paving, and lighting the streets, &c., in the city of London, authorised the commissioners to order a rate in the several wards of the city of London, to be made by the aldermen and the major part of the common councilmen, upon all persons who inhabited, held, occupied, possessed, or enjoyed any land, house, shop, warehouse, &c., or other tenement or hereditament within the said several wards, and who, by the laws then in being, should be liable to be rated to the relief of the poor. By another clause, it was made lawful for the alderman and the major part of the common-councilmen of each ward, at a court of wardmote to be holden for the choice of ward officers, to return to the wardmote the names and places of abode of a competent number of substantial inhabitants of such ward, of whom so many as the alderman, &c., should think fit and direct, not exceeding half the number of persons so returned, should be so chosen at the said wardmote to be collectors of the said rates and assessments for one year: *Held*, that the word *inhabitant* in the latter clause meant *resiant*; and, therefore, that one of the several partners in a commercial establishment who occupied a house for the purpose of his business in the ward, but who resided elsewhere, was not liable to serve the office of collector of the rates. *Downs v. Martyn, E. 9 G. 4.* 62

# COLONIAL COURT.

*See* *DEBT, 1.*

# COMMENCEMENT OF ACTION.

*See* *EVIDENCE, 9. PLEADING, 13.*



## COMMISSIONERS OF BANKRUPT.

See BANKRUPT, 3.

By the 6 G. 4, c. 16, s. 33, commissioners of bankrupt are authorised, by writing under their hands, to summon before them certain persons; and if any such person so summoned shall not come before them at the time appointed, having no lawful impediment made known to them at the time of their meeting, and allowed by them, it shall be lawful for them, by warrant under their hands and seals, to authorise the person therein named to apprehend such person, and bring him before them to be examined: *Held*, that in order to justify the commissioners in issuing their warrant for the apprehension of a witness to whom they had directed a summons, it was necessary that a reasonable time should intervene between the service of the summons and the time when the witness was thereby required to attend; and that the question whether the service of the summons was in that respect reasonable or not, was a question of fact to be submitted to a jury. *Semble*, that the commissioners are not bound to have information on oath of the service of the summons before they issue their warrant, but that it is sufficient if the summons be actually served. *Grocock v. Cooper*, F. 9 G. 4. 211

## COMMISSIONERS OF SEWERS.

Where commissioners of sewers, acting *bonâ fide* for the benefit of the levels for which they were appointed, erected certain defences against the inroads of the sea, which caused it to flow with greater violence against and injure the adjoining land not within the levels: *Held*, that they could not be compelled to make compensation to the owner of that land, or to erect new works for his protection, for that all owners of land exposed to the inroads of the sea, or commissioners of sewers acting for a number of land-owners, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others. *Rex v. Commissioners of Sewers for Pagham, Sussex*, T. 9 G. 4. 355

## COMMITMENT.

See EVIDENCE, 5.

## CONDITION.

See EJECTMENT, 3.

## CONTINUANCE.

See PLEADING, 11.

## CONVICTION.

By stat. 6 G. 4, c. 108, s. 3, if any vessel therein described shall be found on the high seas within 100 leagues of any part of the coast of the United Kingdom, or shall be discovered to have been within the said distance, having on board the goods therein specified, the goods and the vessel shall be forfeited. By section 49, every person who

shall be found or discovered to have been on board any vessel liable to forfeiture under that act for being found or discovered to have been within any of the distances or places mentioned in the act from the United Kingdom, shall forfeit 100*l.*, and may be detained and taken before two justices, to be dealt with as thereafter mentioned. By section 74, any offence against that act shall, for the purpose of prosecution, be taken to have been committed, and the penalties incurred, at the place on land in the United Kingdom into which the person committing such offence, or incurring such penalty, shall be taken, brought, or carried; and in case such place on land is situate within any city, &c., the justices of the peace for the city, &c., as well as those for the county within which such city is situate, shall have jurisdiction to try all offences committed upon the high seas against the act. A vessel liable to forfeiture under this act was seized in a part of the river Orwell where the justices of Ipswich had jurisdiction, and a person found on board the vessel was taken to Harwich, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found on the high seas on board a vessel liable to forfeiture: *He d*, that the justices of Harwich, being justices at the first place on land to which the party was carried, had jurisdiction to try the offence. When the vessel was first boarded, she was just entering the harbour of Harwich: *Held*, that in the absence of all other evidence, a person then found on board, might properly be found to have been on board on the high seas. *In the matter of J. Nunn*, M. 9 G. 4. 644

## CORNWALL, DUCHY OF.

See EVIDENCE, 24, 25, 26.

## CORPORATION.

1. By an act of parliament certain persons were incorporated as the Hull Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorised to make a dock, quays, wharfs, &c., which it was enacted should be vested in them for the purposes of the act. Amongst other things it was provided, that "all goods, &c., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that act, should be liable to pay, and should be charged and chargeable with the like rates of wharfage and payments as were usually taken or received for any goods, &c., loaded or discharged upon any quays or wharfs in the port of London:" *Held*, that as the premises were only vested in the company for the purposes of the act, they had no common-law right to a compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays. *The Dock Company at Kingston-upon-Hull v. La Marche*, E. 9 G. 4. 42

2. Where a party had been sworn into and had exercised a corporate office for more than six years, the Court, in the exercise of their discretion, and without deciding whether he was protected by the 32 G. 3, c. 58, refused to grant a quo warranto information against him, on the ground of his not having been sworn in before the proper officer. *Rez v. R. Brooks*, T. 9 G. 4.

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3. Where an election to an office in a corporation was to be made by a select body appointed by the charter to be aiding the mayor: *Held*, that the mayor was not bound to give to the members of such select body specific notice of a meeting to be holden for the purpose of such election; but that a reasonable and usual notice, requiring them to attend at a meeting of the corporation, at a time specified, without stating for what purpose the meeting was called, was sufficient. *Rez v. Pulsford*, T. 9 G. 4.

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4. Information for usurping the office of jurat of the borough of Q. Plea, that the borough of Q. was a free borough, and that the burgesses of the borough were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough, and that by charter it was granted that the mayor, bailiffs, and burgesses, by whatever name they had before been incorporated, should thereafter be a body corporate by the name of "mayor, jurats, bailiffs, and burgesses;" that there should be one of the more honest and discreet burgesses or inhabitants called "mayor," to be elected as therein mentioned; and four honest and discreet burgesses or inhabitants called "jurats;" and ~~two~~ other honest and discreet burgesses or inhabitants called "bailiffs;" that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and whenever it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them (of whom the mayor should be one), within convenient time, to nominate another or others of the burgesses or inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs of the borough. The plea then stated a vacancy in the office of jurat, and that the defendant, being an inhabitant of the borough, was duly elected to be a jurat. Replication, first, putting in issue the due election of the defendant; and, secondly, that from the time of granting the charter hitherto, it had been used and accustomed within the borough that every inhabitant of the borough elected to be a jurat, before he took upon himself the office of jurat, should be sworn and admitted a free burgess of the borough, and that the defendant, before he took upon himself the office of jurat, had not been admitted and sworn a burgess. Demurrer. Upon the trial of the issues in fact, it appeared that at the election of the defendant, there

were present the mayor, two bailiffs, and two jurats: *Held*, that the election was valid, for the general rule, that a majority of each definite part of the elective body should be present at the election, could not apply to this corporation, because in the event of the death or removal of one of the bailiffs, it was impossible that at the election of a new bailiff there should be present a majority of the bailiffs.

*Held*, upon demurrer to the replication, that according to the true construction of the charter, it was competent to the corporation to elect the jurats from the inhabitants of the borough or from the burgesses, and therefore that the plea was good, inasmuch as it showed that the defendant was an inhabitant of the borough at the time when he was elected to the office of jurat. *Rez v. Greet*, T. 9 G. 4. 363

### COSTS.

See INDICTMENT, 3. PRACTICE, 4, 9, 13, 14, 16.

### COVENANT.

See DEED, 1.

Covenant against the assignee of the lease for non-payment of rent. Plea, that before the rent became due the defendants assigned all their estate and interest in the demised premises to A. B. Replication, that in and by the indenture the lessee, for himself, his executors, administrators, and assigns, covenanted that he, his executors or administrators, should not assign the premises thereby demised without the consent of the lessor, and that no consent was given: *Held*, upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign, did not stop the assignee from setting up the assignment; and, secondly, that the action being founded on privity of estate, the liability of the defendant ceased as soon as the privity of estate was destroyed. *Paul v. Nursa and Others*, T. 9 G. 4. 486

### DEBT.

See EVIDENCE, 13. LANDLORD AND TENANT, 6.

Debt lies on the decree of a colonial court made for payment of the balance due on a partnership account. *Hanley v. Soper the Elder*, F. 9 G. 4. 16

### DEED.

See TRESPASS, 3.

1. An indenture recited, that A. and B., in May, 1813, had entered into a contract with the commissioners for victualling the navy to supply his majesty's ships with sea provisions and victualling stores, and that the said A. and B., in September, 1813, had mutually agreed to dissolve the copartnership entered into by them as aforesaid for carrying on the business of the said contract, and all other contracts entered into with the commissioners by B. or A., and in which they or either of them were in anywise interested or concerned, and all other copartnerships whatsoever

subsisting between them; and upon the treaty for such dissolution it was agreed, that the share of B. in the property belonging to the copartnership should be estimated at 50,000*l.*, and be taken by A. at that sum. It then further recited, that it had been agreed that A. should by his bond indemnify B. against all damages by reason of his having entered into the said recited contract with A., and by reason of all other contracts entered into by B. and A. respectively, and in which they, or *either of them*, had any interest as aforesaid. The indenture then witnessed that A. and B., by mutual consent, dissolved the said copartnership so entered into, and then or lately subsisting between them, for supplying his majesty's ships with provisions and stores, under or by virtue of the said recited contract, and of all other contracts in which B. and A., or *either of them*, had any interest or concern as aforesaid. The deed then contained a mutual release of all actions, accounts, reckonings, &c., which either of them, A. and B., now had or ever had, or which either of them, or either of their executors, should or might thereafter have, claim, or demand against, from, or under the other of them, or his heirs, executors, &c., for or by reason of the said copartnership or copartnerships so thereby dissolved as aforesaid, upon or by reason of any of the acts, matters, and things whatsoever in anywise relating to the said recited contract, and all other contracts in which B. and A., or *either of them*, had any interest whatsoever. B. then assigned to A. all the share and interest of him B. of and in all the debts and sums of money whatsoever then due and owing to them, A. and B., under or by virtue of the same several contracts or otherwise, and all bonds, bills, &c., relating to the said contract debts and sums of money, or any part thereof, and all the goods, stock, and effects whatsoever then belonging to them, the said A. and B. as such copartners respectively, and all the right, title, and interest of him, B., of, in, to, from, out, or in respect of the *premises*. A power was then given to A. to recover and give discharges for the said debts.

At the time when this deed was executed, B. and A. had been concerned in conducting business together as contractors for the navy. In some contracts B. was solely interested as contractor; in others A. was solely interested as contractor; and in some they were jointly interested as partners and contractors. They had, however, both been concerned in all the contracts, A. having been agent in managing those contracts in which B. was solely interested, and B. having been agent in managing those contracts in which A. was solely interested. And there was money due from the commissioners of the navy in respect of each of these classes of contracts, and C., the executor of B., received the amount of those sums from the commissioners: *Held*, that by this deed the contracts in which B. had been originally

separately interested was constituted, as between A. and B., partnership contracts, and consequently that A. was entitled by the deed to receive all sums due to B. in respect of those contracts, at the time of the execution of the deed.

By the deed, B., for himself, his heirs, executors, and administrators, covenanted that, for and notwithstanding any act done by him, B., it should be lawful for A. to receive the money, debts, and premises thereby assigned without any let, suit, interruption, or denial of B., his executors or administrators, or any person claiming under him or them: *Held*, that the words "for and notwithstanding any act done by B." being inconsistent with the subsequent part of the covenant, ought to be rejected; and therefore that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of B. in respect of the contracts mentioned in the indenture. *Belcher v. Sikes*, E. 9 G. 4. Page 185

2. By marriage settlements between W. M. and T. M., son and heir apparent of W. M., of the first part; J. H. and Mary H., of the second part; and L. G. and J. H., trustees, of the third part; W. M. and T. M. bargained and sold to the trustees certain lands called Ninnisses and Sandry's Fields, and other lands called Varwell, then in possession of W. M. and T. M., to hold unto the trustees, their heirs and assigns, as to Sandry's Fields and Ninnisses, to the use of W. M. for life, remainder to the use of the trustees during the life of W. M., upon trust to preserve contingent remainders; with remainder to the use of the said T. M. for life; remainder to the said trustees and their heirs during the life of T. M., upon trust to preserve contingent remainders; with remainder to the first and other sons of T. M. by M. H. successively in tail male, with remainder to the use of the right heirs male of T. M. for ever; and as to all the other settled premises, to the use of T. M. for life, with remainder to the use of trustees, their heirs and assigns, during the life of T. M., in trust to preserve contingent remainders; with remainder to the use of M. H. for her life, for raising out of the rents and profits an annuity of 25*l.* per annum, and subject thereto to the use of the first and other sons of T. M. by M. H. successively in tail male, with remainder for want of issue male by T. M. on the body of M. H. begotten, or if such issue male should die without issue male, and T. M. should have any daughter or daughters by M. H. at the time of his death, then that the trustees, their heirs and assigns, should stand seised of the said hereditaments to the use of the issue female of T. M. by M. H. for raising portions as therein mentioned to such daughter and daughters, and that until twenty-one the trustees and their heirs should, out of the rents, raise such maintenance of such daughter and daughters as to the trustees should seem meet; and after raising the said sums for the maintenance for such daughter and daughters as aforesaid, or in default of issue female, to

the use of the right heirs *ma's* of T. M. for ever: *Held*,

First, that the last words were words of limitation, and not of purchase, and that T. M. took the ultimate remainder in fee; and,

Secondly, if they were words of purchase, still they would create a contingent remainder during the life of T. M., which would vest immediately upon his death in his heir, who might devise the same.

Thirdly, that by the limitation as to the Varwell and Crugmere closes, the trustees took an estate only during the infancy of the daughters; and,

Fourthly, even if they took a fee, it was a fee determinable when the portions should have been raised; and twenty years of possession adverse to their claim having occurred, the presumption was, that the right of the trustees had been released and satisfied.

W. M. died leaving two sons, who died without issue. The survivor of them devised the estate to his wife for life, remainder to all and every the children of Richard E. and M. P. who should be living at the time of his wife's death. There were living at her death nine children of R. E. and M. P. Of these, two, during her life and while their estate remained contingent, had levied fines *sur connuance de droit como ceo* of their shares. In April, 1824, A. B. entered upon the lands comprised in the marriage settlement, and kept possession, and in May, 1824, all the children of R. E. and M. P. by lease and release conveyed the lands comprised in the marriage settlement, in given proportions, to a purchaser: *Held*, that the children of R. E. and M. P. might convey their interests without having first made any entry in the lands, although A. B. was in possession.

Secondly, as to the shares of the two who had levied fines while their estates were contingent, that their interest was not thereby extinguished. *Doe dem. Bruns and Another v. Martyn*, T. 9 G. 4. 497

## DEEPING FEN.

See FEN LANDS.

## DEPOSIT.

See VENDOR AND VENDEE.

## DEVISE.

1 Devise to A. for life, remainder unto the surviving children of W. J. and J. W., and their heirs for ever; the rents and profits to be divided between them in equal proportions, share and share alike: *Held*, that the word "surviving" referred to the testator's death, and not that of the tenant for life. *Doe on the demise of Long v. Prigg*, E. 9 G. 4. 231

2. Where the tenant of lands granted to him and his heirs *pur auter vie*, devised them "to A. B.," without saying more, and A. B. died, living *cestui que vie*: *Held*, that the heir of the devisor was entitled to the lands as special occupant. *Doe on the de-*

*mise of Jeff and Hunter v. Robinson*, E. 9 G. 4. 296

## DISTRESS.

1 It was stated in a special verdict, that by an indenture A. demised to B. all that wharf next the river Thames described by abutments; together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river Thames, opposite to and in front of the wharf, between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised: *Held*, that the meaning of this finding either was, that the land was demised as appurtenant to the wharf, and then it would be a finding that one piece of ground was appurtenant to another, which in law could not be; or that the mere use of the land passed by the indenture, and that was a mere privilege or easement, out of which rent could not issue, and consequently that the lessor could not distrain, for rent in arrear, barges, the property of B., lying in the space between high and low water mark, and attached to the wharf by ropes. *Buzzard and Others, Assignees, v. Capel*, E. 9 G. 4. 141

2. Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there, for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession: *Held*, that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving any one in possession, was not an abandonment of the distress, the 11 G. 2, c. 19, s. 10, giving the landlord power to impound or otherwise secure on the premises goods distrained for rent arrear. *Swann v. The Earl of Falmouth*, T. 9 G. 4. 456

3. The statute 38 G. 3, c. 5, s. 9, enacts, "That the collectors of the land-tax shall levy and collect the rates assessed, according to the intent of that act; and they are required to demand all sums of money taxed and assessed of the parties themselves, as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment."

Sect. 17 enacts, "That if any person shall refuse or neglect to pay any sum of money whereto he shall be assessed, upon demand by the collector, it shall be lawful for the collector to distrain," &c. A collector, having made a demand of the land-tax upon the premises, charged at a time when the party liable to pay was absent from home, and not upon the party himself, and distrained immediately after mak-

ing such demand, the distress was held to be unlawful; for that before he distrained he was bound to allow a reasonable time to elapse after the demand made, in order that the party liable to pay the tax might have an opportunity of complying with the demand.

By sect. 2, the sum therein mentioned is to be levied within the year; and by sect. 12 it is enacted, "That the fourth part of that sum, for the first quarterly payment, shall be levied on or before the 24th day of June, 1798; that the same sum, for the second quarterly payment, shall be levied before the 29th of September, 1798; the like sum, for the third quarterly payment, on or before the 25th day of December, 1798; and the like sum, for the last of the quarterly payments, on or before the 25th day of March, 1799." *See* *Simble*, That the sums due for the last quarterly payment may be levied by the collector at any time during the current quarter. *Gibbs v. Stead*, T. 9 G. 4. 528

## DUCHY OF CORNWALL.

*See* EVIDENCE, 24, 25, 26.

### EASEMENT.

*See* DISTRESS, 1.

### EJECTMENT.

*See* EVIDENCE, 3.

1. Where a party was presented to a rectory, in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void, on the ground that it was simoniacal, and the king then presented A. B., and he was instituted and inducted: *Held*, that he might maintain ejectment for the rectory, against the person who had been simoniacally presented. *See on the several demises of Watson, Clerk, v. Fletcher, Clerk*, E. 9 G. 4. 25
2. Ejectment for a messuage and tenement. Judgment entered up generally for the plaintiff: *Held*, no ground for reversal on error. *See d. Lawrie and Another v. Dyeball*, E. 9 G. 4. 70
3. By a memorandum of agreement, in consideration of the rent and conditions thereafter mentioned, A. was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was stipulated that no buildings should be included or leased by virtue of the agreement; and it was further agreed and stipulated, that A. should take, at the rent aforesaid, certain other parcels as the same might fall in; and, lastly, it was stipulated and conditioned, that A. should not assign, transfer, or underlet any part of the said lands and premises, otherwise than to his wife, child or children: *Held*, that by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment. *See on the demise of Henniker v. Watts*, E. 9 G. 4. 308

4. A fine was levied by A. in Hilary term, 1821. A. and B. claimed to be heir at law of C. There being several actions depending to try, whether A. or B. was heir at law; it was agreed that the rent should be paid into bankers, to abide the event of one of those causes. The cause was decided in favour of A. in 1823, and the rent paid into the bankers was then paid over to him. It included half a year's rent due from the tenant on the 25th of March, 1821: *Held*, in an ejectment brought subsequently on the demise of B., in which he succeeded in showing that he was heir at law of C., that A. had no seisin in Hilary term, 1821, when the fine was levied, and consequently that the fine did not operate as a bar to the ejectment. *See on the demise of Lidgebird v. Lawson*, M. 9 G. 4. 606

5. A cottage standing in the corner of a meadow (belonging to the lord of a manor), but separated from it and from a high road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told, that if he was allowed to resume possession, it would only be during pleasure. He did resume and keep possession for fifteen years more, and never paid any rent: *Held*, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord. *See dem. Thomson v. Clark*, M. 9 G. 4. 717
6. In ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only; and may be treated either as tenant or trespasser at the election of the mortgagee. *See on the demise of Roby v. Maissey*, M. 9 G. 4. 767

### ESCAPE.

*See* EVIDENCE, 5.

### ELEGIT.

*See* TRESPASS, 3.

### EVIDENCE.

*See* CONVICTION.

1. Where a defendant pleaded, by way of set-off, a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear: *Held*, that he was not bound to prove that he had paid the money in order to set it off, but that on production of the bond the plaintiff was bound to prove payment. *Penny and Another, Assignees, v. Foy*, E. 9 G. 4. 11
2. A witness called to prove the receipt of a sum of money was shown an acknowledgment of the receipt of such money signed by himself, and, on seeing it, said that he

- had no doubt he had received it, although he had no recollection of the fact: *Held*, that this was sufficient parol evidence of the payment of the money, and that the written acknowledgment having been used to refresh the memory of the witness, and not as evidence of the payment, did not require any stamp. *Maugham v. Hubbard and Robinson, Assignees*, E. 9 G. 4. 14
2. A will more than thirty years old may be read in evidence without proof of its execution, although the testator has died within thirty years, and some of the subscribing witnesses are proved to be still living. After the lapse of more than 100 years, *Held*, that in the absence of evidence to the contrary, the death of a party without issue might be presumed. *Doe on the demise of Oldham and Wife v. Wolley*, E. 9 G. 4. 22
4. The mother of a pauper stated, that about twenty-four years ago she received money from the parish officers of S. to put her son out apprentice, and that she accordingly put him out; that the indenture was signed by her, the pauper, the master, and by a witness; that she gave it to the wife of a market-gardener, who attended the market of S., to take to the overseers of the parish of S.; that the market-gardener and his wife were both dead, the latter having survived her husband; that she did not know whether the market-gardener's wife had left any will, but had heard that she had. Evidence was then given that search had been made in the parish chest of S. for the indenture, and that it could not be found: *Held*, that as it was the duty of the overseers if the indenture had come into their possession to deposit it in the parish chest, the presumption was, that it was lost or destroyed, and therefore that secondary evidence of the execution and contents of the indenture was admissible. *The King v. The Inhabitants of Stourbridge*, E. 6 G. 4. 96
5. In an action against the marshal for an escape, the declaration alleged that the plaintiff and W. B. having divers disputes, by mutual bonds of submission, referred them to the arbitration of C. and D.; that an award was made ordering W. B. to pay the plaintiff a certain sum of money, on, &c.; and because the award was not performed, plaintiff sued and prosecuted out of the Court of C. P. a writ commanding defendant to attach W. B. (then being in his custody), so that he might have his body before the justices of C. P., on, &c., to answer, &c.; and W. B. being and remaining in the custody of defendant as such marshal, by virtue of the attachment, on, &c., was brought before Sir S. G., a judge of C. P., at his chambers, by writ of habeas corpus, and by him committed to the custody of the warden of the Fleet, and afterwards was brought before Sir J. L., a judge of K. B., at chambers, and by him committed to the custody of the defendant, charged with the attachment; and that the defendant afterwards suffered him to escape: *Held*, that the plaintiff was bound to prove the execution of the bond of submission by himself as well as by W. B. *Semble*, That he need not have done so had he alleged and proved a rule of C. P. ordering the issuing of the attachment, although proof of such rule, without a statement of it in the declaration, would not be sufficient. *Quære*, whether the commitment by a judge at chambers was legal? *Brazier v. Jones*, E. 9 G. 4. 124
6. The common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall, and the land on which it stands, belongs to the owners of those adjoining lands in equal moieties, as tenants in common. *Cubitt v. Porter*, E. 9 G. 4. 257
7. In trover for a chattel claimed by the plaintiff as vendee of an executor, the will is not evidence of the title of the executor. The probate must be produced. *Pinney v. Pinney*, T. 9 G. 4. 335
8. By the Welsh Judicature Act, 5 G. 4, c. 106, s. 21, it is enacted, that in all transitory actions which shall be brought in any court of record out of the principality, and the debt or damages recovered shall not amount to 50*l.*, and it shall appear on the evidence given on the trial that the cause of action arose in the principality, and that the defendant was resident in Wales at the time of the service of any writ or other mesne process served on him in such action, and it shall be so testified under the hand of the judge who tried the cause, a judgment of nonsuit shall be entered: *Held*, that it is discretionary in the judge who tries the cause to grant or refuse the certificate mentioned in the act; and that where the judge has refused to certify, this Court has no power to order a judgment of nonsuit to be entered: *Held*, by Lord *Tenterden*, C. J., at *Nisi Prius*, that it lies upon the defendant to show that he was residing in Wales at the time when the writ or mesne process was served on him in the action, and that general evidence that his usual place of residence both before and subsequent to the commencement of the action was in Wales, is not sufficient. *Jones v. Kenrick*, T. 9 G. 4. 337
9. Declaration upon a bill of exchange drawn on the 29th November, 1827, payable two months after date, was entitled generally of Hilary term 1828: *Held*, that it was competent to the plaintiff to prove, by the parol evidence of the attorney without producing the writ, that the action was commenced after the 1st of February when the bill became due. *Lester v. Jenkins*, T. 9 G. 4. 339
10. Where an indictment for a conspiracy alleged, that "at the court of quarter sessions holden, &c., an indictment against A. B. was preferred to and found by the grand jury:" *Held*, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up. *Rez v. Smith, and two Others*

11. An indictment had been preferred against a county for not repairing a bridge, at the instance of the inhabitants of a parish; and the question intended to be tried was, whether the inhabitants of the parish or of the county were liable to repair it? The Court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the repair of the bridge. *Ess v. The Justices of the County of Buckingham*, T. 9 G. 4. 375
12. A declaration averred that the defendant had notice of the dishonour of a bill of exchange: *Held*, that that allegation was satisfied by proof that he had notice as soon as it could reasonably be given, and that it was unnecessary, therefore, to state in the declaration the special circumstances which rendered valid the notice given at a later period than in ordinary cases would be sufficient. *Firth v. Thrush*, T. 9 G. 4. 387
13. The general rule of law is, that a debt cannot be assigned. The exception to that rule is, that where there is a defined and ascertained debt due from A. to B., and a debt to the same, or a larger amount due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B., the latter may maintain an action against C. But in such action it is incumbent on the plaintiff to show, that, at the time when C. promised to pay B., there was an ascertained debt due from A. to B. *Fairlie v. Denton and Barker*, T. 9 G. 4. 395
14. In an action by the indorsee against the drawer of a bill, it appeared by the plaintiff's case that he had received it from the acceptor in discharge of a debt due from him. For the defendant it was stated, that the bill was accepted in discharge of part of a debt due from the acceptor to the drawer; that it was indorsed and delivered to the acceptor, in order that he might get it discounted; and that he delivered it to the plaintiff upon condition, that if he procured cash for it, he might retain out of it the amount of the debt due to him from the acceptor; but that he never did get cash for the bill: *Held*, that the acceptor could not be examined to prove these facts; for, although he was uninterested as to the amount sought to be recovered on the bill, he was interested as to the costs, against which he would have to indemnify the defendant if the plaintiff obtained a verdict. *Edmonds v. Lowe*, T. 9 G. 4. 407
15. Where the speaker of the House of commons certified that a certain sum was due to A. B., "a witness summoned by and on behalf of C. D., one of the sitting members for Dublin, to give evidence before an election committee," the Court ordered judgment to be entered up against C. D. for that sum as upon a warrant of attorney, the certificate being held conclusive as to the fact of the witness having been summoned, and the statute 53 G. 3, c. 71, being held applicable to witnesses summoned by a sitting member as well as to those summoned by a petitioner. *Magrave v. White*, T. 9 G. 4. 412
16. An order of justices, requiring the stewards of a benefit society to readmit A. B. who had been expelled, recited, that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order: *Held*, that the recital was not evidence of the enrolment of the rules. *Ess v. Gilkes and others*, T. 9 G. 4. 439
17. A. being tenant of premises under an indenture of lease granted by B., a sequestration issued out of the Court of Chancery against the latter. A. then signed the following instrument:—"I hereby attorn, and become the tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit in chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon: *Held*, that this was an agreement to become tenant, and required a stamp. *Held*, secondly, that the defendant, not having received possession of the premises from C. and D., might dispute their title, and that the lease not being proved to have been surrendered, was an answer to the action. *Cornish and another v. Searell*, T. 9 G. 4. 471
18. In an action founded on the statute 11 G. 2, c. 19, s. 3, against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant.  
*Semble*, That the statute is so far penal, that it is incumbent, in an action by the landlord against a third party for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section. *Brooks v. Noakes*, T. 9 G. 4. 537
19. In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipt of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money. *Whitnash and Another v. George and Another*, M. 9 G. 4. 556
20. A fieri facias issued against the goods of A. The goods were seized by the bailiff. The execution creditor authorised the bailiff to quit possession, the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Before the sale, another fieri facias issued at the suit of a second creditor. To that writ the sheriff returned nulla bona. The second creditor brought an action for a false return, and recovered the value of the debtor's goods, against the sheriff. The sheriff, having previously paid the value of

- such goods to the creditor under the first fi. fa., brought an action to recover from him that money: *Held*, that he was entitled to recover the same, unless it were shown by the defendant, that at the time when the sheriff made the payment he was acquainted with the fact of the misconduct of his officer; and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with the knowledge of the misconduct of his officer. *Crowder and Another v. Long, Gent., One., &c.*, M. 9 G. 4. 598
21. Relief given to a pauper while he is residing out of the relieving parish, is *prima facie* evidence of a settlement in that parish; and evidence of one instance in which relief was so given, was held to be sufficient to warrant a finding by the sessions that the pauper was settled in the relieving parish, although upon a second application relief had been refused. *The King v. The Inhabitants of Edwinstowe*, M. 9 G. 4. 671
22. Upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l.* per annum and paid rent for the same, the respondents, in order to show that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness, on cross-examination, having stated that the letting was by a written instrument, this Court held, that it could be proved only by the production of that instrument. *Rees v. The Inhabitants of Rowden*, M. 9 G. 4. 708
23. A cottage standing in the corner of a meadow (belonging to the lord of a manor), but separated from it and from a high road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told, that if he was allowed to resume possession, it would only be during pleasure. He did resume and keep possession for fifteen years more, and never paid any rent: *Held*, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord. *Dos dem. Thomson v. Clark*, M. 9 G. 4. 717
24. Where, in trover for copper ore, it was proved that the plaintiff was in possession of land in which he sunk a shaft and raised the ore in question, and the same witness, on cross-examination, proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land, when he sunk his shaft: *Held*, that this was *prima facie* evidence of the plaintiff's title to the ore, which must be left to the jury. *Rowe v. Brenton*, M. 9 G. 4. 737
25. On account of the interest which the crown has in the Duchy of Cornwall, all acts which affect the possessions or revenues of the Duchy are to be considered as public acts;

and, on this ground, a document purporting to be a caption of seisin, taken to the use of the first Duke of Cornwall, by certain persons assigned by his letters-patent to do so, was received in evidence to show the rights of the Duke. *Ibid.*

26. An ancient extent of crown lands, found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its construction the directions of the stat. 4 E 1, will be presumed to have been taken under competent authority, although the commission cannot be found. *Ibid.* 747
27. An entry in the register-book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not admissible in evidence, nor is the private memorandum of the fact made by the clerk, who was present at the baptism. *Dos dem. Warren v. Bray*, M. 9 G. 4. 813

## EXECUTION.

See SHERIFF, 1, 2.

## EXECUTION CREDITOR.

See BANKRUPT, 9.

## EXECUTOR.

1. To an action upon a joint and several promissory note of A. and B., the latter being a mere surety, brought by payee against the administrator of B., the defendant pleaded that the cause of action did not accrue within six years, upon which the plaintiff took issue. The plaintiffs proved, that within six years, and during the lifetime of B., A. made a payment on account of the note; B. afterwards died: *Held*, that such payment operated as a new promise by B. to pay according to the nature of the instruments, and that his administrator was liable on the note. *Burleigh and Others, Executors, v. Scott, Administratrix*, E. 9 G. 4. 36
2. An administrator is not by the condition of the bond given in pursuance of the statute of distributions, 22 and 23 Car. 2, c. 10, bound to distribute the surplus of the intestate's estate, after payment of debts, &c., until a decree directing him so to do has been made by the court into which his inventory and account has been exhibited. *The Archbishop of Canterbury v. Tappin*, E. 9 G. 4. 151
3. In trover for a chattel claimed by the plaintiff as vendee of an executor, the will is not evidence of the title of the executor. The probate must be produced. *Pinney v. Pinney*, T. 9 G. 4. 335

## EXTRA-PAROCHIAL PLACE.

See SETTLEMENT BY HIRING AND SERVICE, 5.

## FEME COVERT.

1. A married woman taken in execution, together with her husband, for a debt due from her before marriage, is not entitled to



be discharged, unless it appears that she has no separate property; even although the husband has been discharged under the insolvent act. *Sparkes and Others v. Bell and Wife*, E. 9 G. 4. 1

2. A woman sued after her marriage as a feme sole having suffered judgment to go by default, and having been taken in execution, is not entitled to be discharged out of custody on the ground that she was a married woman, but must be left to her writ of error. *Moses v. Richardson*, T. 9 G. 4. 421

#### FEN LANDS.

See SETTLEMENT BY HIRING AND SERVICE, 5.

By statute 16 & 17 Car. 2, the trustees or adventurers for draining Deeping Fen were seised of 10,036 acres of land, and the rates and taxes for completing the drainage of the fen were to be levied on the 10,036 acres. They were called taxable lands. There were 5000 acres called free lands, and the other lands in the fen consisted of common land. The adventurers were at their own costs and charges to keep the river Glen with sufficient diking, roading, scouring, and banking. By a subsequent act of the 41 G. 3, reciting the former act, and that the works of drainage were insufficient, and that the owners and proprietors of free lands, and persons interested in the commons, notwithstanding their exemption from the costs of making works of drainage, together with the adventurers, being desirous to obtain a better drainage for all the said lands, and more effectually to protect the same from injury by a breach in any of the banks of the river, had agreed that the respective works of the drainage thereafter mentioned should be made, erected, maintained, and supported at the expense of the trusts, proprietors, and persons, in the proportions thereafter mentioned. By a subsequent clause, the commissioners under that act were thereby required well and sufficiently to enlarge, deepen, and scour out the river, and straighten the course thereof where necessary, and enlarge and straighten the banks of the river in such manner as in the judgment of the commissioners should be requisite; and the costs of executing all the said works were to be paid and borne by the several persons then respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons, in such proportions as to the commissioners should seem just and equitable, and as they by their award should appoint, and such respective banks, after the commissioners should have completed the same, should from time to time be repaired by such persons as the commissioners should by their award direct: *Held*, that the adventurers were not, by this statute, released from the obligation imposed on them by the 16 & 17 Car. 2, of cleansing and scouring the river Glen. *Syson v. Johnson*, M. 9 G. 4. 795

#### FIERI FACIAS.

See SHERIFF, 1, 2, 4.

#### FINE.

See DEED, 2. EJECTMENT, 4.

#### FOREIGN JUDGMENT.

A discharge of an insolvent debtor upon a cessio bonorum by the court of session in Scotland, is no answer to an action brought by an English subject in a court in this country to recover a debt contracted in England, although it appeared that the plaintiff opposed the discharge of the defendant in the Scotch court.

*Semble*, That it would have been an answer to the action if the plaintiff had claimed to have the benefit of the Scotch law, and to take a distributive share of the property of the insolvent. *Phillips v. Allan*, T. 9 G. 4. 477

#### FORFEITURE.

See EJECTMENT, 3.

#### FRAUDS, STATUTE OF.

Where A., at the request of B., entered into a bond with him and C. to indemnify D. against certain debts due from C. and D., and B. promised to save A. harmless from all loss by reason of the bond: *Held*, that this promise was binding although not in writing, and that A. might recover from B. the whole of the moneys which he was compelled to pay by virtue of the bond. *Thomas v. Cook*, M. 9 G. 4. 728

#### FRIENDLY SOCIETY.

An order of justices, requiring the stewards of a benefit society to readmit A. B. who had been expelled, recited, that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order: *Held*, that the recital was not evidence of the enrolment of the rules. *Rees v. Gilkes and others*, T. 9 G. 4. 439

#### GAME.

The statute 58 G. 3, c. 75, prohibits the buying of pheasants in all cases; and, therefore, by a contract for the sale of live pheasants, no property passes to the purchaser. *Helps v. Glenister*, M. 9 G. 4. 553

#### GOODS BARGAINED AND SOLD.

See ASSUMPSIT, 3.

#### HIGHWAY.

See APPEAL, 1.

1. In an order of justices for stopping up an unnecessary highway under the 55 G. 3, c. 68, s. 2, it must be stated, that it appeared to the justices *on view* that the way was unnecessary; and, therefore, an order merely stating that the justices had upon view found, or that it appeared to them, that the way was unnecessary is bad. *Rees v. The Justices of Worcestershire*, E. 9 G. 4. 254
2. An order of justices, for diverting and stopping up a highway, substituted for the

old highway a new road, which passed partly over a road, described in the order as a new line of turnpike road. The sessions confirmed the order, subject to a case. This Court quashed the order of sessions, because it did not appear on the face of the order, or of the case, that the public had the same permanent right to pass over the new road as they had to pass along the old one.

*Quare*, Whether justices can divert a road for carriages, and continue it for foot-passengers? *Rea v. Winsor*, M. 9 G. 4.

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#### HULL DOCK COMPANY.

*See* CORPORATION, 1.

#### HUNDRED, ACTION AGAINST.

A building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements: *Held*, not to be a house, out-house, or barn, within the meaning of the stat. 9 G. 1, c. 22, s. 7, so as to entitle the owner to maintain an action against the hundred for an injury sustained by him in consequence of the malicious setting fire to the same. *Elmore v. The Inhabitants of the Hundred of St. Brevells*, T. 9 G. 4.

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#### INDICTMENT.

1. Where an indictment for a conspiracy alleged, that "at the court of quarter sessions holden, &c., an indictment against A. B. was preferred to and found by the grand jury:" *Held*, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up. *Rea v. Smith, and two Others*, T. 9 G. 4.

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2. An indictment had been preferred against a county for not repairing a bridge, at the instance of the inhabitants of a parish; and the question intended to be tried was, whether the inhabitants of the parish or of the county were liable to repair it? The Court refused to compel the inhabitants of the parish to allow the parties indicted to inspect the parish books and documents relating to the repair of the bridge. *Rea v. The Justices of the County of Buckingham*, T. 9 G. 4.

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3. The statute 7 G. 4, c. 64, s. 23, which provides for the allowance of costs to prosecutors and witnesses in certain cases of misdemeanour, does not apply where the indictment has been removed into K. B. by certiorari. *Rea v. Richards*, T. 9 G. 4.

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4. An order of justices, requiring the stewards of a benefit society to readmit A. B. who had been expelled, recited, that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order: *Held*, that the recital was not evi-

dence of the enrolment of the rules. *Rea v. Gibbs and others*, T. 9 G. 4.

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#### INDORSEMENT.

*See* PARTNERSHIP, 3.

#### INFERIOR COURT.

*See* PRACTICE, 5.

#### INFORMATION.

An information stated, that certain goods were about to be imported into Great Britain from parts beyond the seas, in respect of which certain duties would be payable; and that one R. H., at the time of committing the offence thereafter mentioned, was a person employed in the service of the customs, and that it was the duty of him, as such person so employed in the service of the customs, to arrest and detain all such goods as should be imported, which upon such importation would become forfeited to the king by virtue of any act of parliament relating to the customs, and which would be liable to be seized; and that the defendant, well knowing, &c., unlawfully and corruptly solicited R. H., being such person so employed in the service of the customs, when certain goods should be imported, which, upon importation, would be liable to be seized or forfeited, to forbear to arrest and detain the same, &c.: *Held*, that inasmuch as it was not the duty of every person employed in the service of the customs to arrest and detain goods which would be liable to be seized as forfeited, this count was bad for want of showing that R. H. was a person whose duty it was to arrest and detain such goods. *Rea v. Everett*, E. 9 G. 4.

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#### ILLEGAL AGREEMENT.

*See* GAME. INSOLVENT DEBTORS' ACT.

#### INHABITANT.

*See* COLLECTOR.

#### INNKEEPER.

Where a traveller went to an inn, and desired to have his luggage taken into the commercial room, to which he resorted, from whence it was stolen: *Held*, that the innkeeper was responsible, although he proved that, according to the usual practice of his house, the luggage would have been deposited in the guest's bed-room, and not in the commercial room, if no order had been given respecting it. *Richmond v. Smith*, E. 9 G. 4.

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#### INSOLVENT DEBTOR.

*See* FOREIGN JUDGMENT.

#### INSOLVENT DEBTORS' ACT.

*See* FEME COVERT, 1.

A., an insolvent, having petitioned the Court for the relief of insolvent debtors, to be discharged out of custody, and having been brought up before that Court to be exa-

mined, was opposed by B., a creditor, and remanded to a future day. Before that day arrived, C., who acted as the attorney of A., in consideration of B.'s withdrawing his opposition from A., undertook that A. should be the sole assignee of B.'s estate, and should receive 100*l.* out of the insolvent's estate within three weeks from his appointment: *Held*, that this agreement was contrary to the policy of the insolvent act, and therefore void. *Murray v. Reeves*, *Genl., One, &c.*, T. 9 G. 4. 421

### INSURANCE.

1. A vessel insured from Sierra Leone to London, and upon which the insurance was to endure until she had been moored in good safety twenty-four hours, arrived in the evening of the 18th of February, and the captain having orders to take her into the King's Dock at Deptford, moored her near the dock-gates. On the following morning he was informed at the dock, that no order for his admittance had been received; but that if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the Navy Board on the 21st, but on account of the ice the ship could not be moored until the 27th, and then, in warping her towards the dock, a rope broke, she grounded and was totally lost. The jury found that the vessel remained at her moorings from the 18th to the 27th of February on account of the ice, and not for want of an order to enter the dock: *Held*, that upon this finding the plaintiff was entitled to recover, for that the place where the vessel was moored not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay. *Samuel v. The Royal Exchange Assurance Company*, F. 9 G. 4. 119
2. Where a vessel insured in a valued policy of 2000*l.*, received damage by perils of the sea, which could have been repaired for 1450*l.*, but the jury found that the vessel was not worth repairing: *Held*, that this was a total loss, and the assured were entitled to recover the sum at which the vessel was valued in the policy. *Allen v. Sugrue*, M. 9 G. 4. 561
3. It is the duty of a party effecting an insurance on life or property to communicate to the underwriters all material facts within his knowledge, touching the subject-matter of the insurance; and it is a question for the jury whether any particular fact was or was not material. *Lindenau v. Desborough*, M. 9 G. 4. 586

### JOINT STOCK COMPANY.

A member of a joint-stock company was employed by the company as their agent to sell goods for them, and received a commission of two *per cent.* for his trouble, and one *per cent. del credere* for guaranteeing the

purchaser. Having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his, the drawer's own order, and after it had been accepted, he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company: the company were then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10*s.* in the pound upon the amount of the bill by way of composition: *Held*, first, that the indorsee, being a member of the company, could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company; and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account. *Teagus v. Hubbard*, T. 9 G. 4. 345

### JUDGE'S CERTIFICATE.

*See* WELSH JUDICATURE ACT.

### JUDGMENT.

*See* TRESPASS, 3.

### JURISDICTION.

*See* JUSTICES, 6. PRACTICE, 1, 13.

### JUROR.

Alienage is a ground of challenge to a juror: and if the party has an opportunity of making his challenge and neglects it, he cannot afterwards make the objection. *Semble*, That since the 7 G. 4, c. 60, s. 27, alienage is not a ground of challenge to a special juror. *Rez v. Sutton and Others*, T. 9 G. 4. 417

### JUSTICES.

*See* RATE.

1. An order of justices made under the 5 G. 4, c. 71, stated, "that the justices, after due examination had on oath, *having adjudged* the legal place of settlement of a pauper lunatic confined in a lunatic asylum, to be in M., did thereby require the churchwardens and overseers of M. to pay to the treasurer of the lunatic asylum 10*l.* 16*s.* due for twenty-four weeks' maintenance, &c., being at the rate of 9*s.* per week, and to pay the same weekly sum during so long a time as the pauper should remain therein." The parish of M. appealed against this order, and in their notice of appeal described it as an order of settlement and maintenance: *Held*, that as the parish of M. had treated this as the order of settlement, it must be presumed that there was no other order, and therefore the words "having adjudged," must be understood as words of present adjudication, and that the order was good in this respect: *Held*, secondly, that so much

of the order as was retrospective was bad, but that it was good for the residue. *Rez v. The Inhabitants of Maulden*, E. 9 G. 4.

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2. The 17 G. 2, c. 38, s. 4, does not make it imperative on the justices to hear and determine an appeal at the sessions next following the publication of the rate, but they may adjourn it to the next sessions. Where a rate was published on the 16th of September, and the appeal was entered at the Michaelmas sessions, but the defendant did not give notice of his intention to try his appeal at those sessions, and the justices adjourned it as a matter of course to the Epiphany sessions, according to the usual practice, and the appellant gave notice of his intention to try his appeal at the Epiphany sessions, when the justices refused to hear it, on the ground that it ought to have been heard and determined at the preceding sessions; this court granted a mandamus to compel them to hear the appeal. *Rez v. The Justices of Wilts*, T. 9 G. 4.

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3. An order of justices, requiring the stewards of a benefit society to readmit A. B. who had been expelled, recited, that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order, that recital was not evidence of the enrolment of the rules. *Rez v. Gilkes and others*, T. 9 G. 4.

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4. By the statute 4 G. 4, c. 95, s. 87, a right of appeal is given in certain cases, if the party gives notice within six days after the cause of complaint arises. Two justices having made an order upon the surveyors of the roads in a township, to perform a certain part of the statute-duty on a turnpike-road running through the township, and to pay to the surveyor of that road a certain part of the money received as a composition for statute-duty; *Held*, that the cause of complaint did not arise until a copy of the order in writing had been served, and that notice of appeal given within six days from that time was valid. *Rez v. The Justices of Lancashire*, M. 9 G. 4.

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5. By stat. 6 G. 4, c. 108, s. 3, if any vessel therein described shall be found on the high seas within 100 leagues of any part of the coast of the United Kingdom, or shall be discovered to have been within the said distance, having on board the goods therein specified, the goods and the vessel shall be forfeited. By section 49, every person who shall be found or discovered to have been on board any vessel liable to forfeiture under that act for being found or discovered to have been within any of the distances or places mentioned in the act from the United Kingdom, shall forfeit 100*l.*, and may be detained and taken before two justices, to be dealt with as thereinafter mentioned. By section 74, any offence against that act shall, for the purpose of prosecution, be taken to have been committed, and the penalties incurred, at the place on land in

the United Kingdom into which the person committing such offence, or incurring such penalty, shall be taken, brought, or carried; and in case such place on land is situate within any city, &c., the justices of the peace for the city, &c., as well as those for the county within which such city is situate, shall have jurisdiction to try all offences committed upon the high seas against the act. A vessel liable to forfeiture under this act was seized in a part of the river Orwell where the justices of Ipswich had jurisdiction, and a person found on board the vessel was taken to Harwich, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found on the high seas on board a vessel liable to forfeiture: *Held*, that the justices of Harwich, being justices at the first place on land to which the party was carried, had jurisdiction to try the offence. *In the Matter of J. Nunn*, M. 9 G. 4.

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## LANDLORD AND TENANT.

1. It was stated in a special verdict, that by an indenture A. demised to B. all that wharf next the river Thames described by abutments; together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river Thames, opposite to and in front of the wharf, between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised: *Held*, that the meaning of this finding either was, that the land was demised as appurtenant to the wharf, and then it would be a finding that one piece of ground was appurtenant to another, which in law could not be; or that the mere use of the land passed by the indenture, and that was a mere privilege or easement, out of which rent could not issue, and consequently that the lessor could not distrain, for rent in arrear, barges, the property of B., lying in the space between high and low water mark, and attached to the wharf by ropes. *Buzard and Others, Assignees, v. Capel and another*, E. 9 G. 4.
- 141
2. By a memorandum of agreement, in consideration of the rent and conditions thereinafter mentioned, A. was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was stipulated that no buildings should be included or leased by virtue of the agreement; and it was further *agreed and stipulated*, that A. should take, at the rent aforesaid, certain other parcels as the same might fall in; and, lastly, it was *stipulated and conditioned*, that A. should not assign, transfer, or underlet any part of the said lands and premises, otherwise than to his wife, child or children: *Held*, that by the last clause a condition was created

for the breach of which the lessor might maintain an ejectment. *See on the demise of Henniker v. Watt, E. 9 G. 4.* 308

3. A. demised to B. the first and second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, B. told A. that she would quit immediately. The latter answered she might go when she pleased. B. quitted, and A. accepted possession of the apartments: *Held*, that A. could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent pro rata, for the actual occupation of the premises for any period short of a quarter. *Grimman v. Legge, T. 9 G. 4.* 324

4. Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there, for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession: *Held*, that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving any one in possession, was not an abandonment of the distress, the 11 G. 2, c. 19, s. 10, giving the landlord power to impound or otherwise secure on the premises goods distrained for rent in arrear. *Swann v. The Earl of Falmouth, T. 9 G. 4.* 456

5. A. being tenant of premises under an indenture of lease granted by B., a sequestration issued out of the Court of Chancery against the latter. A. signed the following instrument:—"I hereby attorn, and become tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit in chancery, and to hold the same for such time and on such conditions as might be subsequently agreed upon: *Held*, that this was an agreement to become tenant, and required a stamp. *Held*, secondly, that the defendant, not having received possession of the premises from C. and D., might dispute their title, and that the lease not being proved to have been surrendered, was an answer to the action. *Cornish v. Searell, T. 9 G. 4.* 471

6. In an action founded on the statute 11 G. 2, c. 19, s. 3, against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant.

*Seems*, That the statute is so far penal, that it is incumbent, in an action by the landlord against a third party for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section. *Brooks v. Noakes, T. 9 G. 4.* 537

## LAND-TAX.

*See DISTRESS, 3.*

## LEASE

*See EJECTMENT, 3.*

## LIBEL.

- A. having discharged his servant, and hearing that he was about to be engaged by B., wrote a letter to B., and informed him that he had discharged him for misconduct. B., in answer, desired further information. A. then wrote a second letter to B., stating the grounds on which he had discharged the servant. In an action by the servant against A., for a libel contained in this letter, it was held, that, assuming the letter to be a privileged communication, it was properly left to the jury to consider whether the second letter was written by A. *bona fide*, or with an intention to injure the servant. *Pattison v. Jones, M. 9 G. 4.* 578

## LICENSE BY PAROL.

*See RECTOR.*

## LIEN.

1. A., B. and C., together with others, were part-owners of a ship engaged in the whale fishery. The usual mode of managing the cargo was, that, on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of B. and sold by him, and the proceeds were applied towards the discharge of the expenses of the ship. The blubber was deposited in a warehouse rented of C. by the owners of the ship, and the oil produced from it was then put into casks, each owner's share being weighed out and placed separately in the warehouse, in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid. In that case the warehouseman used to detain the oil till the ship's husband's demand had been satisfied. The ship having arrived from her voyage in 1825, the above course was followed. The share weighed out and set apart for A. was twenty-nine tons, which was stowed in the warehouse in casks, which had A.'s initials put on them. In January, 1826, A. became bankrupt: twenty tons of the oil had been delivered to A. before his bankruptcy; the remaining nine tons remained in the warehouse at the time of his bankruptcy. In January 1826, the warehouseman had orders from C., the ship's husband, not to deliver to A. the remaining oil, as his share of the disbursements of the ship had not been paid: *Held*, in an action of trover brought by the assignees of A. against C. for the residue of A.'s oil, that the other part-owners had originally a lien on it for his share of the disbursements of the ship; and that this right was not divested by the separation of A.'s share from the residue, and placing it in casks marked with

his name. *Holderness and Another, Assignees, v. Shackels*, M. 9 G. 4. 612

**LIMITATIONS, STATUTE OF.**

1. To an action upon a joint and several promissory note of A. and B., (the latter being a mere surety,) brought by payee against the administrator of B., the defendant pleaded that the cause of action did not accrue within six years; upon which the plaintiff took issue. The plaintiff proved, that within six years; and during the lifetime of B., A. made a payment on account of the note; B. afterwards died: *Held*, that such payment operated as a new promise by B. to pay according to the nature of the instrument, and that his administratrix was liable on the note. *Burleigh and Others, Executors, v. Stott, Administratrix*, E. 9 G. 4. 36
2. To a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant knowing the goods to have been the intestate in his lifetime, and of the plaintiff as administrator since death, *afterwards*, and after the death of the intestate, to wit, on, &c., converted the same goods; a plea of not guilty of the premises within six years is bad upon special demurrer. *Pratt, Administrator, v. Swayne*, E. 9 G. 4. 285

**LIQUIDATOR.**

*See PRACTICE*, 14.

**MANDAMUS.**

*See APPEAL. JUSTICES*, 2.

1. Mandamus granted to compel a bishop to grant inspection of his register of presentations and institutions to a living in his diocese to a person claiming the right of patronage, although the bishop also claimed that right. *Rex v. The Bishop of Ely*, E. 9 G. 4. 112
2. To a mandamus to admit A. B. into the office of churchwarden, reciting that he had been duly elected, a return that A. B. was not duly elected is good. *Rex v. Williams*, M. 9 G. 4. 681

**MARRIAGE.**

Where a marriage was solemnised by license between a man and woman, the former being a minor, whose father was living, and who did not consent to the marriage: *Held*, that it was nevertheless valid, the 4 G. 4, c. 75, s. 16, which requires such consent, being directory only. *Rex v. The Inhabitants of Birmingham*, E. 9 G. 4. 29

**MARRIAGE ACT.**

*See MARRIAGE.*

**MARSHAL.**

*See EVIDENCE*, 5.

**MASTER AND SERVANT.**

*See LIBEL.*

**MESNE PROFITS.**

*See TRESPASS*, 3.

**MINOR.**

*See MARRIAGE ACT.*

**MONEY HAD AND RECEIVED**

*See BANKRUPT*, 4. *SHERIFF*, 1, 2, 4. *STAKE / HOLDER*.

**MORTGAGOR.**

*See EJECTMENT*, 6.

**MUTUAL CREDIT.**

*See BANKRUPT*, 1.

**NEW TRIAL.**

*See PRACTICE*, 9.

**NIL DICIT.**

*See SHERIFF*, 1, 2.

**NON PROS.**

*See PRACTICE*, 15.

**NOTICE TO QUIT.**

*See OVERSEERS*, 1.

**ORDER OF JUSTICES.**

*See HIGHWAY. JUSTICES*, 3, 4, 5.

**ORDER OF REMOVAL.**

*See APPEAL*, 4, 5.

**ORDER OF SETTLEMENT.**

*See JUSTICES*, 1.

**OVERSEERS.**

1. Where a pauper who had been permitted to occupy a parish house, went away from home: *Held*, that the overseers might lawfully enter and resume possession, without giving any notice to quit, and were not bound to pursue the mode pointed out by the 59 G. 3, c. 12, s. 24. *Wildbor v. Rainforth*, E. 9 G. 4. 4
2. An assistant overseer, elected and appointed under the provision of the statute 59 G. 3, c. 12, at an annual salary of 10*l.*, will gain a settlement by serving such office for a year. But the appointment in writing, under the hands and seals of the justices, to such office requires a stamp of 2*l.* *Rex v. The Inhabitants of Lew*, M. 9 G. 4. 655
3. An assistant overseer appointed under the 59 G. 3, c. 12, and having by virtue of his office the poor-rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant, when lawfully demanded according to the 17 G. 2, c. 3. *Bennett v. Edwards*, M. 9 G. 4. 702

**PALACE COURT.**

Where in an action commenced in the Palace Court, and afterwards removed into K. B., the plaintiff recovers less than the sum for which he held the defendant to bail, the Court of K. B. has no power to allow the defendant his costs under the statute 43 G. 3, c. 46, s. 8. *Handley v. Levy*, M. 9 G. 4. 637

## PARISH HOUSE.

See POOR, 1.

## PARTNERSHIP.

See DEED, 1.

1. A member of a joint-stock company was employed by the company as their agent to sell goods for them, and received a commission of two *per cent.* for his trouble, and *one per cent. del credere* for guaranteeing the purchaser. Having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his, the drawer's own order, and after it had been accepted, he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company: the company were then indebted to him in a larger amount than the sum mentioned in the bill. The acceptor having become insolvent before the bill became due, the drawer received from him 10*s.* in the pound upon the amount of the bill by way of composition: *Held*, first, that the indorsee, being a member of the company, could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company; and that he could not recover the sum received by the drawer on the bill, because the money must be taken to have been received by him in his character of a member of the company, and not on his own account. *Teague v. Hubbard*, T. 9 G. 4. 345
2. In August 1821, A., a trader, being indebted to B. and C., then in partnership, but about to separate, gave a warrant of attorney to secure payment by instalments to B. alone, who knew that A. was then insolvent. In October A. committed an act of bankruptcy, and in November, at B's desire, he sent goods to the warehouse of B. and C. as a further security for the debt. In December B. and C. dissolved partnership; and the former afterwards received from A. several sums of money on account of the warrant of attorney, and also sold the goods, towards satisfaction of the debt. A commission of bankrupt issued against A. in January 1823, and in November of that year B. died: *Held*, that A.'s assignees might recover from C. the money paid by A. on the warrant of attorney, by an action for money had and received, and the value of the goods, by an action of trover. *Biggs and Others, Assignees of Collier, v. Fellows*, T. 9 G. 4. 402
3. A., B., and C. carried on business in co-partnership, as factors and commission merchants, in England and America; in England under the firm of A. C. and Co.; in America in the name of C. alone. When C. went to America, he had written instructions from his partners, one of which was, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." A., B.,

and C., in order to obtain consignments from America, made advances or granted drafts or bills of exchange, or indorsements of them to their principals, on the security of the goods consigned. In order to obtain a consignment from W., C., in his own name, indorsed bills for him, which were to be provided for by others drawn by W. on A. C. and Co. in England, which were to be provided for by the proceeds of the consignment. Before the latter bills were presented for acceptance, A. and B. had become bankrupts: *Held*, that the indorsement of the bills by C. must be considered as an indorsement by the firm, and that they were liable upon those bills. *South Carolina Bank v. Case*, T. 9 G. 4. 427

## PARTY WALL.

The common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall, and the land on which it stands, belongs to the owners of those adjoining lands in equal moieties, as tenants in common.

Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other. *Cubitt v. Porter*, E. 9 G. 4. 257

## PATRONAGE.

See MANDAMUS, 1.

## PENAL ACTION.

See LANDLORD AND TENANT, 6. OVERSEER, 3.

## PHEASANTS.

See GAME.

## POOR.

Where a pauper, who had been permitted to occupy a parish house, went away from home: *Held*, that the overseers might lawfully enter and resume possession, without giving any notice to quit, and were not bound to pursue the mode pointed out by the 59 G. 3, c. 12, s. 24. *Wildbor v. Rainforth and Another*, E. 9 G. 4. 4

## POOR-RATE.

See APPEAL. OVERSEER, 3.

1. The 7. G. 3, c. 37, which enacts that certain lands to be embanked from the river Thames shall be "free from all taxes and assessments whatsoever," exempts the occupiers of premises built on those lands from payment of poor-rates in respect of such occupation. *Rex v. The London Gas Light and Coke Company*, E. 9, G. 4. 54
2. On the hearing of an appeal against a poor-rate, the sessions have no jurisdiction to quash the rate for a defect appearing on the face of the rate itself, unless that defect be specified in the notice as a cause of appeal.

*Re v. The Inhabitants of Bromyard, E.*  
9 G. 4. 240

# POWER OF ATTORNEY.

*See* STAMP, 5.

Debt lies on the decree of a colonial court made for payment of the balance due on a partnership account. One of the partners gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person he might see fit: *Held*, that this gave the son a power to submit the accounts to arbitration. *Henley v. Soper the Elder, E. 9 G. 4.* 16

# PLEADING.

1. Where defendant pleaded, by way of set-off, a bond given to him by the plaintiff, conditioned to pay an annuity to a third person, which had been previously granted by the defendant, which defendant was before liable to pay, and to indemnify defendant therefrom: *Held*, that the defendant was not bound to prove damage; but that the plaintiff, in order to discharge himself, was bound to prove payment of the annuity, in the same manner as if he had been sued in the bond. *Penny and Another, Assignees, v. Foy, E. 9 G. 4.* 11
2. An information stated, that certain goods were about to be imported into Great Britain from parts beyond the seas, in respect of which certain duties would be payable; and that one R. H., at the time of committing the offence thereafter mentioned, was a person employed in the service of the customs, and that it was the duty of him, as such person so employed in the service of the customs, to arrest and detain all such goods as should be imported, which upon such importation would become forfeited to the king by virtue of any act of parliament relating to the customs, and which would be liable to be seized; and that the defendant, well knowing, &c., unlawfully and corruptly solicited R. H., being such person so employed in the service of the customs, when certain goods should be imported, which, upon importation, would be liable to be seized or forfeited, to forbear to arrest and detain the same, &c.: *Held*, that inasmuch as it was not the duty of every person employed in the service of the customs to arrest and detain goods which would be liable to be seized as forfeited, this count was bad for want of showing that R. H. was a person whose duty it was to arrest and detain such goods. *Re v. Everett, E. 9 G. 4.* 114
3. In an action against the marshal for an escape, the declaration alleged that the plaintiff and W. B. having divers disputes, by mutual bonds of submission, referred them to the arbitration of C. and D.; that an award was made, ordering W. B. to pay the plaintiff a certain sum of money on, &c.; and because the award was not performed, plaintiff sued and prosecuted out of the Court of C. P. a writ commanding defendant to attach W. B. (then being in his custody), so that he might have his

body before the justices of C. P. on, &c., to answer, &c.; and W. B. being and remaining in the custody of defendant as such marshal, by virtue of the attachment, on, &c., was brought before Sir S. G., a judge of C. P., at his chambers, by writ of habeas corpus, and by him committed to the custody of the warden of the Fleet, and afterwards was brought before Sir J. L. a judge of K. B., at chambers, and by him committed to the custody of the defendant, charged with the attachment; and that the defendant afterwards suffered him to escape: *Held*, that the plaintiff was bound to prove the execution of the bond of submission by himself as well as by W. B. *Semble*, That he need not have done so had he alleged and proved a rule of C. P., ordering the issuing of the attachment, although proof of such rule, without a statement of it in the declaration would not be sufficient.

*Quare*, whether the commitment by a judge at chambers was legal. *Brazier v. Jones, E. 9 G. 4.* 124

4. By a deed, B., for himself, his heirs, executors, and administrators, covenanted that, for and notwithstanding any act done by him, B., it should be lawful for A. to receive the money, debts, and premises thereby assigned without any let, suit, interruption, or denial of B., his executors or administrators, or any person claiming under him or them: *Held*, that the words "for and notwithstanding any act done by B." being inconsistent with the subsequent part of the covenant, ought to be rejected; and therefore that it was a sufficient breach of that covenant to allege a receipt of the money by the executor of B. in respect of the contracts mentioned in the indenture. *Bolcher v. Sikes, E. 9 G. 4.* 185
5. To a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant, knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, *afterwards*, and after the death of the intestate, to wit, &c., converted the same goods. A plea of not guilty of the premises within six years is bad upon special demurrer. *Pratt v. Swaine, E. 9 G. 4.* 285
6. Declaration upon a bill of exchange drawn on the 29th of November, 1827, payable two months after date, was entitled generally of Hilary term, 1828: *Held*, that it was competent to the plaintiff to prove by the parol evidence of the attorney (without producing the writ), that the action was commenced after the 1st of February, when the bill became due. *Lester v. Jenkins, T. 9 G. 4.* 339
7. Where an indictment for a conspiracy alleged, that "at the court of quarter sessions holden, &c., an indictment against A. B. was preferred to and found by the grand jury:" *Held*, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the



bill, although no record had been in fact drawn up. *Rez v. Smith, and two Others*, T. 9 G. 4. 341

8. Information for usurping the office of jurat of the borough of Q. Plea, that the borough of Q. was a free borough, and that the burgesses of the borough were a body corporate, consisting of the mayor, bailiffs, and burgesses of the borough, and that by charter it was granted that the mayor, bailiffs, and burgesses, by whatever name they had before been incorporated, should thereafter be a body corporate by the name of "mayor, jurats, bailiffs, and burgesses;" that there should be one of the more honest and discreet burgesses or inhabitants called "mayor," to be elected as therein mentioned; and four honest and discreet burgesses or inhabitants called "jurats;" and two other honest and discreet burgesses or inhabitants called "bailiffs;" that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and whenever it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them (of whom the mayor should be one), within convenient time, to nominate another or others of the burgesses or inhabitants of the borough for the time being to be a jurat or jurats, bailiff or bailiffs of the borough. The plea then stated a vacancy in the office of jurat, and that the defendant, being an inhabitant of the borough, was duly elected to be a jurat. Replication, first, putting in issue the due election of the defendant; and, secondly, that from the time of granting the charter hitherto, it had been used and accustomed within the borough that every inhabitant of the borough elected to be a jurat, before he took upon himself the office of jurat, should be sworn and admitted a free burgess of the borough, and that the defendant, before he took upon himself the office of jurat, had not been admitted and sworn a burgess. Demurrer. Upon the trial of the issues in fact, it appeared that at the election of the defendant, there were present the mayor, two bailiffs, and two jurats: *Held*, that the election was valid, for the general rule, that a majority of each definite part of the elective body should be present at the election, could not apply to this corporation, because in the event of the death or removal of one of the bailiffs, it was impossible that at the election of a new bailiff there should be present a majority of the bailiffs.

*Held*, upon demurrer to the replication, that according to the true construction of the charter, it was competent to the corporation to elect the jurats from the inhabitants of the borough or from the burgesses, and therefore that the plea was good, inasmuch as it showed that the defendant was an inhabitant of the borough at the time when he was elected to the office of jurat. *Rez v. Gre t*, T. 9 G. 4. 363

9. The indorsee of a bill of exchange dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to the prior indorsers; the attorney, after inquiry, having received information of the indorser's place of residence, on the following day consulted his client, and on the third day sent notice to the indorsee: *Held*, that the notice was sufficient. The declaration averred that the defendant had notice: *Held*, that that allegation was satisfied by proof that he had notice as soon as it could reasonably be given, and that it was unnecessary, therefore, to state in the declaration the special circumstances which rendered valid the notice given at a later period than in ordinary cases would be sufficient. *Firth v. Thrusell*, T. 9 G. 4. 387

10. Covenant against the assignee of the lessee for non-payment of rent. Plea, that before the rent became due the defendants assigned all their estate and interest in the demised premises to A. B. Replication, that in and by the indenture the lessee, for himself, his executors, administrators, and assigns, covenanted that he, his executors or administrators, should not assign the premises thereby demised without the consent of the lessor, and that no consent was given: *Held*, upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign, did not estop the assignee from setting up the assignment; and, secondly, that the action being founded on privity of estate, the liability of the defendant ceased as soon as the privity of estate was destroyed. *Paul v. Nurse and Others*, T. 9 G. 4. 486

11. A suit commenced in K. B. by latitat, may be well continued by a bill of Middlesex, sued out by the plaintiff, with intent to implead the defendant for the same causes of action. *Page v. Newman*, T. 9 G. 4. 489

12. Trespass for mesne profits. Plea, a judgment recovered by the defendant, in 1822, against A.; an elegit sued out thereon; an inquisition held, whereby it was found, that A. at the time when the judgment was recovered was seised for life of (inter alia) the premises mentioned in the declaration, and that the sheriff delivered those premises to the defendant. Replication, that in 1820, A., by indenture, bargained and sold, inter alia, the premises mentioned in the declaration to the plaintiff; that he entered and continued in possession until the committing of the trespasses. The defendant craved oyer of the indenture; and it thereby appeared, that, for the purpose of securing an annuity to B., A. in 1819 had conveyed the premises in the declaration mentioned to B., for one hundred years; and that, subject thereto, he conveyed them to the plaintiff for better securing a second annuity granted by the deed. Upon demurrer, the replication was held to be good, inasmuch as it showed that the plaintiff was in possession at the time when the trespass was committed; that A. had no interest in

- tue premises at the time when the judgment was obtained against him; that the defendant consequently could derive no title from him, and that he was a wrongdoer. *Chatsfield v. Parker*, T. 9 G. 4. 543
12. Where the assignees of a bankrupt enter the premises of a third person, to seize goods which were the property of the bankrupt, it is not necessary that an action against them, should be brought within three months after the fact committed, the act of the assignees not being done "in pursuance of the statute," within the meaning of the 6 G. 4, c. 16, s. 44. *Edgs v. Parker*, M. 9, G. 4. 697
14. Where a declaration alleged that defendant was assistant overseer, that a rate for the relief of the poor was made and duly allowed; and although defendant, as such assistant overseer, had the rate in his possession, and although plaintiff at a reasonable time demanded an inspection of it, and tendered 1s., yet defendant refused to produce it, whereby he forfeited 20l.: *Held*, on motion in arrest of judgment, that the count was sufficient; for if the defendant had the rate in his custody as assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded. *Bennet v. Edwards*, M. 9 G. 4. 702

PRACTICE.

See ARREST. TRIAL AT BAR.

1. Where upon an appeal against an order of removal, the justices at sessions were equally divided, and made an order that the hearing of the appeal should be adjourned. One of the justices, who voted in favour of the respondent parish was a rated inhabitant of that parish. An application for a certiorari to remove the order of sessions, in order that it and the original order of removal might be quashed, was refused on the ground that, even if the order of sessions were erroneous, this court had no jurisdiction to review it. *The King v. The Justices of Monmouthshire*, E. 9 G. 4. 137
2. The court will, upon motion, set aside a warrant of attorney, judgment, and execution, on the ground that they are fraudulent against creditors, provided the facts upon which the alleged fraud depends are clearly made out by the affidavits; but when those facts are disputed, they will direct an issue to try the question of the fraud. *Harrod v. E. H. Benton*, E. 9 G. 4. 217
3. The court will not compel an attorney to pay a sum of money he has received in his character of attorney; he having after the receipt of the money become bankrupt and obtained his certificate. *Ex parte Cullisford v. Warren, Gent, one, &c.*, E. 9 G. 4. 220
4. Where a defendant obtains a mandamus under 13 G. 3, c. 63, s. 44, for examining witnesses in India, the plaintiff, gaining the cause is entitled to the costs of cross-examining those witnesses. *Whytt v. Macintosh*, E. 9 G. 4. 317
5. Where a cause has been sent back by proelendo to an inferior court, this Court will not quash the writ, on the ground that

- the cause is important and fit to be tried in the superior court. *Hayward v. Wright*, T. 9 G. 4. 386
6. Where there is not, in fact, any cause in court an affidavit entitled "In the King's Bench," but not in any cause, is sufficient. *Ex parte Gregory*, T. 9 G. 4. 409
7. The stat. 8 H. 6, c. 9, s. 6, which gives treble damages to the party grieved by a forcible entry and expulsion, applies only to persons having the freehold; for the remedy is given against the disseisor. *Cole et Uz. v. Eagle and Others*, T. 9 G. 4. 409
8. A woman sued after her marriage as a feme sole, having suffered judgment to go by default, and having been taken in execution, is not entitled to be discharged out of custody on the ground that she was a married woman, but must be left to her writ of error. *Moses v. Richardson*, T. 9 G. 4. 421
9. After a verdict for a defendant, the Court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial. The record was carried down to the Spring assizes following, when it was made a remanet. It was tried a second time at the Summer assizes, when a verdict was again found for the defendant. The Court afterwards ordered, that that verdict should be set aside, and a new trial had between the parties upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial. Upon the third trial a verdict was found for the plaintiff: *Held*, that the plaintiff was entitled to costs occasioned by the cause having been made a remanet at the assizes next following the term, when the first rule was made absolute for a new trial. *Gibbins and Another, Assignees, v. Phillips*, T. 9 G. 4. 437
5. A creditor had obtained judgment by default against his debtor since the statute 6 G. 4, c. 16, s. 108, and the goods having been seized by the sheriff before, yet not sold until after an act of bankruptcy was committed by the debtor, the court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. *In re Washbourn*, T. 9 G. 4. 444
11. A suit commenced in K. B. by latitat, may be well continued by a bill of Middlesex, sued out by the plaintiff, with intent to implead the defendant for the same causes of action. *Page v. Newman*, T. 9 G. 4. 489
12. A defendant, having been arrested, paid into Court the sum indorsed on the writ, together with 20l. as a security for costs, pursuant to the statute 7 & 8 G. 4, c. 71, s. 2. The Court, on the application of the defendant, allowed the plaintiff to take out of Court a given portion of the sum paid into Court; and unless he consented to accept thereof with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any evidence at the trial as to that sum. *Hubbard v. Wilkinson*, T. 9 G. 4. 496

13. Where a judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the master. *Jay, Gent, one, &c. v. Coaks*, M. 9 G. 4. 635
14. Where in an action commenced in the Palace Court, and afterwards removed into K. B., the plaintiff recovers less than the sum for which he held the defendant to bail, the Court of K. B. has no power to allow the defendant his costs under the statute 43 G. 3, c. 46, s. 8. *Handley v. Levy*, M. 9 G. 4. 637
15. An affidavit of debt, stating that the defendant was indebted to the plaintiff as liquidator (duly appointed by the law of France) of an estate, is irregular unless it show that by the law of France a liquidator is entitled to sue. *Tenon v. Mars*, M. 9 G. 4. 638
16. The defendant is not entitled to costs of a judgment of non pros obtained by reason of the plaintiff having omitted to enter the issue on record, after issue joined on a demurrer to a plea in abatement. *Michlam v. Bates*, M. 9 G. 4. 642
17. An affidavit of debt, for money paid for the use and benefit of the defendant, is irregular if it omit to state that it was paid at his request. *Pitt v. New*, M. 9 G. 4. 651
18. In actions by original, the judgment relates to the essoign day of the term in which it is signed. *Whittaker v. Whittaker*, M. 9 G. 4. 768

## PRESENTATION.

See SIMONY.

## PRINCIPAL AND AGENT.

See TROVER, 2.

## PRIVILEGED COMMUNICATION.

See LIBEL.

## PRIVITY OF ESTATE.

See COVENANT, 1.

## PROBATE.

See EVIDENCE, 7.

## PROCEDENDO.

See PRACTICE, 5.

## PROMISSORY NOTE.

See BILL OF EXCHANGE. STAMP, 1.

## PROMOTIONS. Page 552.

## PROSECUTOR.

See INDICTMENT, 3.

## QUO WARRANTO.

See CORPORATION, 2, 3, 4.

## RATE.

See JUSTICES, 2.

A rate in the nature of a county-rate may be levied in Berwick-upon-Tweed, that being

a place not subject to the commission of the peace of any county in England, and never having contributed to a rate made for any county, although it does not lie within the body of an English county, and although no rate had ever been levied there before; the corporation having defrayed out of their own funds the charges to which the sums raised by a county-rate are applicable. *Rex v. The Justices of Berwick-upon-Tweed*, T. 9 G. 4. 327

## RECTOR.

Where a rector granted to A. B., by parol, leave, to make a vault in the parish church, and to bury a certain corpse there, and that he should have the exclusive use of the vault; and afterwards, without the leave of A. B., opened the vault and buried another person there: *Held*, that no action could be maintained against him for so doing; for that, if the rector had power to grant the exclusive use of a vault, he could not do it by parol.

*Semble*, That a rector cannot grant a vault in the church, but only leave to bury there in each particular instance. *Bryan v. Whistler, Clerk*, E. 9 G. 4. 288

## REMANET.

See PRACTICE, 8.

## RESTRICTIVE INDORSEMENT.

See BILL OF EXCHANGE, 6.

## RESIANT.

See COLLECTOR.

## SCOTCH COURT.

See FOREIGN JUDGMENT.

## SEQUESTRATION.

See LANDLORD AND TENANT, 5.

## SET-OFF.

See BANKRUPT, 1. EVIDENCE, 1. PLEADING, 1.

## SETTLEMENT—by Apprenticeship.

1. The parish officers of A. bound a pauper apprentice to his grandfather, who represented himself as a butcher. Indentures were executed with the sanction of two justices. The grandfather, in fact, did not carry on the trade of a butcher, but he and the mother colluded together, and fraudulently imposed him on the justices and the parish officers, as a proper master for the pauper: *Held*, that there having been no fraud in the parish officers, the pauper gained a settlement by serving under this indenture. *Rex v. The Inhabitants of Great Sheppy*, E. 9 G. 4. 74
2. The father of a pauper was about to put him out to service, when it was suggested to him by A., a carpenter, that it would be better for the pauper to learn his (A.'s) trade, instead of going to service, and A. afterwards hired the pauper to learn his

- trade, and to do any other work, as well as that of a carpenter. The pauper went to A. and served him for five years, living during that time with his parents, who provided him with victuals and part of his clothing, the remainder being provided by A. The pauper did any work his master ordered him to do, and at the end of that time he agreed to work for the master as a journeyman, at weekly wages. The sessions having found that this was a defective contract of apprenticeship, and not a contract of hiring, this Court confirmed the order of sessions. *Rez v. The Inhabitants of Combe*, E. 9 G. 4. 62
3. The master of a parish apprentice, not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, and agreed with her to work there for a twelvemonth for his meat and drink. He worked for her for four years and four months. During the first two years he received from her meat and drink. During the third and fourth he received wages: *Held*, first, that no settlement was gained by the service with the sister, the service not being under the indentures: *Held*, secondly, that there had been a putting away of the apprentice without the consent of the justices, within the meaning of the statute 56 G. 3, c. 139, s. 9, and that the pauper did not, by his service with the sister, gain any settlement by hiring and service. *Rez v. The Inhabitants of Skipton*, E. 9 G. 4. 88
4. The mother of a pauper stated that about twenty-four years ago she received money from the parish officers of S. to put her son out apprentice, and that she accordingly put him out; that the indenture was signed by her, the pauper, the master, and by a witness; that she gave it to the wife of a market-gardener, who attended the market of S., to take to the overseers of the parish of S.; that the market-gardener and his wife were both dead, the latter having survived her husband; that she did not know whether the market-gardener's wife had left any will, but had heard that she had. Evidence was then given that search had been made in the parish chest of S. for the indenture, and that it could not be found: *Held*, that as it was the duty of the overseers, if the indenture had come into their possession, to deposit it in the parish chest, the presumption was, that it was lost or destroyed; and, therefore, that secondary evidence of the execution and contents of the indenture was admissible. *Rez v. The Inhabitants of Stourbridge*, E. 9 G. 4. 96
5. An indenture, by which an apprentice was bound for seven years, to serve A. B. for the first four years, and his own father for the last three, to learn two different trades, is a valid indenture, and requires only one stamp. *Rez v. The Inhabitants of Louth*, E. 9 G. 4. 247
6. The stat. 28 G. 3, c. 48, s. 4, makes void all indentures whereby children under eight years of age are bound apprentice to chimney sweepers, and no settlement can be gained by serving under them. *Rez v. The Inhabitants of Hipswell*, T. 9 G. 4. 466
7. Before the execution of an indenture, the master said that the intended apprentice should have better clothes. The apprentice then applied to the parish officers, who agreed to give him 2*l.* on the execution of the indenture, for the purpose of buying clothes, which they did accordingly: *Held*, that the money paid by the parish officers was an expense incurred by reason of an indenture of apprenticeship, within the meaning of the 56 G. 3, c. 139, s. 11, and, therefore, that the indenture required the assent of two justices. *Rez v. The Inhabitants of Maltishall*, M. 9 G. 4. 733
8. The statute 56 G. 3, c. 139, s. 2, enacts, that in all cases where the residence or establishment of business of the person to whom any child shall be bound, shall be within a different county from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed, as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve: *Held*, that in such case the indenture must be allowed by four distinct persons, two of them being justices of the county from which the apprentice is to be bound; and the other two being justices of the county into which he is to be bound. *Rez v. Skipton*, M. 9 G. 4. 774

#### SETTLEMENT—by Emancipation.

- A pauper, while he was under age, quitted his parents and went to sea, serving sometimes in a king's ship, at other times in trading vessels, and remained in such service, and so separated from his father's family, when he attained the age of twenty-one years: *Held*, that he was then emancipated, and that his settlement did not afterwards shift with that of his father. *Rez v. The Inhabitants of Lawford*, E. 9 G. 4. 271

#### SETTLEMENT—by Estate.

- A man living in parish A., under a certificate from parish B., cannot gain a settlement in the former parish by purchasing an estate for money. *Rez v. The Inhabitants of Great Driffield*, M. 9 G. 4. 684

#### SETTLEMENT—by Hiring and Service.

1. Where it was made a question of fact at the sessions whether there was a hiring and service for a year in the appellant parish, and the sessions confirmed the order of removal subject to the opinion of this Court

as to a settlement being gained there by hiring and service: *Held*, that this amounted to a finding by the justices at sessions that there was a hiring and service for a year in that parish, and that such finding ought not to be disturbed by this Court, if there were any premises to warrant it. *Rea v. The Inhabitants of St. Andrew the Great*, T. 9 G. 4. 664

2. Where the court of quarter sessions have found, upon a case stated, that there was no general hiring, this Court will not disturb their decision, if there appear to have been any premises to warrant it. *Rea v. The Inhabitants of Rostiston*, M. 9 G. 4. 668

3. Where the court of quarter sessions have, from facts proved before them, drawn the conclusion that there was an implied hiring for a year, this Court will not, upon a case sent to them by the sessions stating those facts, disturb that decision, if there appear any premises whatever to warrant it. *Rea v. The Inhabitants of St. Martin, Leicester*, M. 9 G. 4. 674

4. A hiring at so much per week, a month's wages or a month's warning, is a hiring for a year. *Rea v. St. Andrew's in Pershore, Worcestershire*, M. 9 G. 4. 679

5. By an act of parliament passed for draining certain fen lands, 5000 acres of the said fen lands were vested in certain trustees as a recompense to the undertakers; and it was enacted, that all the inhabitants that might thereafter upon any part of the land so allotted to the trustees, and were not able to maintain themselves, should be maintained by the said trustees, their heirs, &c., and never become chargeable to all or any of the respective parishes wherein such inhabitants should reside: *Held*, that the lands so vested in the trustees were not thereby made extra-parochial, and that a party, by hiring and service in those lands, gained a settlement either in the parish where that part of the allotted lands where the service was performed was situate, or in the allotted lands themselves, which, for this purpose, were to be considered an incorporated district. *Rea v. The Inhabitants of Crowland*, M. 9 G. 4. 711

#### SETTLEMENT.—By Marriage.

Where the marriage of a female pauper is brought about by the fraud of parish officers, that does not prevent her from acquiring a settlement by marriage in the husband's parish. *Rea v. The Inhabitants of Birmingham*, E. 9 G. 4. 29

#### SETTLEMENT.—By payment of Rates.

A party does not gain any settlement by reason of his having been assessed to and paid the watch-rate in the city of London. *Rea v. The Inhabitants of Christ Church, London*, M. 9 G. 4. 660

#### SETTLEMENT.—By Relief.

Relief given to a pauper while he is residing out of the relieving parish, is *prima facie* evidence of a settlement in that parish: and evidence of one instance in

which relief was so given, was held to be sufficient to warrant a finding by the sessions that the pauper was settled in the relieving parish, although upon a second application relief had been refused. *Rea v. The Inhabitants of Edwinstowe*, M. 9 G. 4. 671

#### SETTLEMENT.—By renting a Tenement.

1. Since the statute 6 G. 4, c. 57, in order to gain a settlement by settling upon a tenement, the reserved rent for one whole year (whatever be its amount) must be paid. *Rea v. The Inhabitants of Ashley Hay*, E. 9 G. 4. 27

2. The 59 G. 3, c. 50, requires, *inter alia*, that in order to acquire a settlement by the renting of a tenement, it shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bona fide hired at and for 10*l.* a year at the least, for the term of one whole year, and that such house or building shall be held and the land occupied for the term of one whole year: *Held*, that a settlement was gained by a pauper hiring and holding for one year a distinct and separate dwelling-house, although part of the house was left to an under-tenant. *Rea v. The Inhabitants of Great Bolton*, E. 9 G. 4. 71

3. A pauper, on the 6th of April 1823, hired a house for a year, at the rent of 12*l.* per annum, in the parish of A. In January 1824, he became chargeable to that parish, and was, by an order of justices, removed to the parish of B. There was no appeal against the order of removal. The pauper returned on the same day to his house in the parish of A., and continued to occupy it until the expiration of the year for which he had hired it, and paid the rent for the year: *Held*, that as the pauper had hired and held the house for a year, and paid the rent for that period, all the requisites of the statute 59 G. 3, c. 50, had been complied with, and that he gained a settlement in the parish of A. by renting a tenement. *Rea v. The Inhabitants of Barham*, E. 9 G. 4. 100

4. Since the 59 G. 3, c. 50, a settlement may be gained by a residence of forty days in the parish, provided the party comply with the conditions mentioned in that act. And, therefore, where a pauper since that statute hired land for a year, at the sum of 10*l.*, and paid that rent, and occupied the land for the whole year, but resided only forty days in the parish, and not upon the land, it was held that he gained a settlement. *Rea v. The Inhabitants of Wainfleet, All Saints*, E. 9 G. 4. 227

5. Upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l.* per annum and paid rent for the same, the respondents, in order to show that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness on cross-examination, having stated that no letting was by a written instrument, it

was held, that it could be proved only by the production of that instrument. *Rea v. The Inhabitants of Rawdon*, M. 9 G. 4.

708

#### SETTLEMENT—By serving an office.

An assistant overseer, elected and appointed under the provision of the statute 59 G. 3, c. 12, at an annual salary of 10*l.*, will gain a settlement by serving such an office for a year. But the appointment in writing, under the bands and seals of the justices, to such an office, with an annual salary annexed to it, requires a stamp of 2*l.* *Rea v. The Inhabitants of Low*, M. 9 G. 4. 655

#### SHERIFF.

1. In March the then sheriff of London seized the goods of a debtor by virtue of a fieri facias. An officer was put in possession of the goods, but the execution creditor directed the sheriff not to sell, and the debtor continued to have the control of his goods until November, when another execution creditor sued out a fieri facias, directed to the succeeding sheriffs of London: *Held*, that the latter were bound to levy under this second fieri facias, and that it was their duty, when they found the officer of the former sheriff in possession, to inquire into the facts, and if they had done so they would have learnt that the first execution was fraudulent. *Lowick v. Crowder*, E. 9 G. 4. 132

2. Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a f. fa., under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution creditor: *Held*, that he was not justified in paying over the money, and was liable to be sued for it by the assignees in an action for money had and received.

*Quare*, whether the sheriff was justified in selling the goods after notice of the bankruptcy. *Notley and Others, Assignees, v. Buck*, E. 9 G. 4. 160

3. A creditor had obtained judgment by default against his debtor since the statute 6 G. 4, c. 16, s. 108, and the goods having been seized by the sheriff, but not sold until after an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. *In re Washbourne*, T. 9 G. 4. 444

4. A fieri facias issued against the goods of A. The goods were seized by the bailiff. The execution creditor authorised the bailiff to quit possession, the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Before the sale, another fieri facias issued at the suit of a second creditor. To

that writ the sheriff returned nulla bona. The second creditor brought an action for a false return, and recovered the value of the debtor's goods against the sheriff. The sheriff, having previously paid the value of such goods to the creditor under the first f. fa., brought an action to recover from him that money: *Held*, that he was entitled to recover the same, unless it were shown by the defendant, that at the time when the sheriff made the payment he was acquainted with the fact of the misconduct of his officer; and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with the knowledge of the misconduct of his officer. *Crowder and Another v. Long, Gent., One, &c.*, M. 9 G. 4. 598

#### SHIP-OWNER.

*See* CHARTER-PARTY.

#### SIMONY.

Where a party was presented to a rectory, in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void, on the ground that it was simoniacal, and the king then presented A. B., and he was instituted and inducted: *Held*, that he might maintain ejectment for the rectory, against the person who had been simoniacally presented. *Doos on the demise of Watson, Clerk, v. Fletcher*, E. 9 G. 4. 25

#### SPEAKER'S CERTIFICATE.

*See* EVIDENCE, 15.

#### SPECIAL VERDICT.

*See* DISTRESS, 1.

#### STAKEHOLDER.

Where A. and B. deposited money in the hands of a stakeholder, to abide the event of a boxing-match between them; and after the battle A. claimed the whole sum from the stakeholder, and threatened him with an action if he paid it over to B., which he nevertheless did by the direction of the umpire: *Held*, that A. was entitled to recover from him his own stake, as money had and received to his use. *Hastelow v. Jackson*, E. 9 G. 4. 221

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1. A promissory note for 1*l.*, payable to A. B. on demand, is a promissory note payable to bearer on demand within the meaning of the 55 G. 3, c. 184, and requires a stamp of two shillings. *Keates v. Whieldon*, E. 9 G. 4. 7

2. A witness called to prove the receipt of a sum of money was shown an acknowledgment of the receipt of such money signed by himself, and, on seeing it, said that he had no doubt he had received it, although he had no recollection of the fact: *Held*

- that this was sufficient parol evidence of the payment of the money, and that the written acknowledgment having been used to refresh the memory of a witness, and not as evidence of the payment, did not require any stamp. *Maugham v. Hubbard and Robinson, Assignees*, E. 9 G. 4. 14
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#### TREBLE DAMAGES.

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*See* OVERSEERS, 1.

1. The common user of a wall separating adjoining lands belonging to different owners, is *prima facie* evidence that the wall, and

the land on which it stands, belong to the owners of those adjoining lands as tenants in common.

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The statute 58 G. 3, c. 75, prohibits the buying of pheasants in all cases, and therefore by a contract for the sale of live pheasants, no property passes to the purchaser. *Hips v. Glenister*, M. 9 G. 4.

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## TURNPIKE ROADS.

*See* APPEAL, 1.

## VAULT.

*See* BURIAL.

## VENDOR AND VENDEE.

A. agreed to sell to B. his interest in a public house, and his furniture, &c., at an appraisement to be made by two appraisers, the same to be paid for at a day fixed by the agreement, on B.'s taking possession, which was to be on or before the 25th of March then next, and 30*l.* was paid by B. as a deposit; and he agreed that if he should not complete his part of the agreement the sum so paid should be forfeited. The buyer and seller appointed appraisers respectively. On the 25th of March the two appraisers met, and the seller's appraiser was then informed that the appraiser of the buyer could not conveniently on that day complete the valuation, but would finish the business the next day. No objection was then made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract: *Held*, that under the circumstances, it was incumbent on the seller, if he intended to insist that the contract should be completed on the day mentioned in the agreement, to have notified such intention to the buyer; and, not having done so, that the latter was entitled to recover back the deposit. *Carpenter v. Blandford*, M. 9 G. 4.

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## WARRANT.

*See* COMMISSIONERS OF BANKRUPT.

## WARRANT OF ATTORNEY.

*See* BANKRUPT, 4, 9. PRACTICE, 2.

## WELSH JUDICATURE ACT.

By the Welsh judicature act, 5 G. 4, c. 106, s. 21, it is enacted, that in all transitory actions which shall be brought in any court of record out of the principality, and the debt or damages recovered shall not amount to 50*l.*, and it shall appear on the evidence given on the trial, that the cause of action arose in the principality, and that the defendant was resident in Wales at the time of the service of any writ or other meane process served on him in such action, and it shall be so testified under the hand of the Judge who tried the cause, a judgment of nonsuit shall be entered: *Held*, that it is discretionary in the Judge who tries the cause, to grant or refuse the certificate mentioned in the act; and that where the Judge has refused to certify, this Court has no power to order a judgment of nonsuit to be entered.

*Held*, by Lord Tentarden, C. J., at Nisi Prius, that it lies upon the defendant to show that he was residing in Wales at the time when the writ or meane process was served on him in the action, and that general evidence that his usual place of residence both before and subsequent to the commencement of the action was in Wales was not sufficient. *Jones v. Kenrick*, T. 9 G. 4.

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## WHARFAGE.

By an act of parliament certain persons were incorporated as the Hull Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorised to make a dock, quays, wharfs, &c., which it was enacted should be vested in them for the purposes of the act. Amongst other things it was provided, that "all goods, &c., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that act, should be liable to pay, and should be charged and chargeable with the like rates of wharfage and payments as were usually taken or received for any goods, &c., loaded or discharged upon any quays or wharfs in the port of London:" *Held*, that as the premises were only vested in the company for the purposes of the act, they had no common-law right to a compensation for the use of them; and that the statute did not give them any right to claim wharfage for goods shipped off from their quays. *The Dock Company at Kingston-upon-Hull v. La Murchie*, E. 9 G. 4.

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## WILLS.

*See* EVIDENCE, 3, 7.

## WITNESS.

*See* BANKRUPT, 3. BILL OF EXCHANGE, 5. EVIDENCE, 14, 15.

## WORK AND LABOUR AND MATERIALS.

*See* ASSUMPSIT, 3.



as to a settlement being gained there by hiring and service: *Held*, that this amounted to a finding by the justices at sessions that there was a hiring and service for a year in that parish, and that such finding ought not to be disturbed by this Court, if there were any premises to warrant it. *Rea v. The Inhabitants of St. Andrew the Great*, T. 9 G. 4. 664

2. Where the court of quarter sessions have found, upon a case stated, that there was no general hiring, this Court will not disturb their decision, if there appear to have been any premises to warrant it. *Rea v. The Inhabitants of Eosliston*, M. 9 G. 4. 668
3. Where the court of quarter sessions have, from facts proved before them, drawn the conclusion that there was an implied hiring for a year, this Court will not, upon a case sent to them by the sessions stating those facts, disturb that decision, if there appear any premises whatever to warrant it. *Rea v. The Inhabitants of St. Martin, Leicester*, M. 9 G. 4. 674
4. A hiring at so much per week, a month's wages or a month's warning, is a hiring for a year. *Rea v. St. Andrew's in Pershore, Worcestershire*, M. 9 G. 4. 679
5. By an act of parliament passed for draining certain fen lands, 5000 acres of the said fen lands were vested in certain trustees as a recompense to the undertakers; and it was enacted, that all the inhabitants that might thereafter upon any part of the land so allotted to the trustees, and were not able to maintain themselves, should be maintained by the said trustees, their heirs, &c., and never become chargeable to all or any of the respective parishes wherein such inhabitants should reside: *Held*, that the lands so vested in the trustees were not thereby made extra-parochial, and that a party, by hiring and service in those lands, gained a settlement either in the parish where that part of the allotted lands where the service was performed was situate, or in the allotted lands themselves, which, for this purpose, were to be considered an incorporated district. *Rea v. The Inhabitants of Crowland*, M. 9 G. 4. 711

#### SETTLEMENT.—By Marriage.

Where the marriage of a female pauper is brought about by the fraud of parish officers, that does not prevent her from acquiring a settlement by marriage in the husband's parish. *Rea v. The Inhabitants of Birmingham*, E. 9 G. 4. 29

#### SETTLEMENT.—By payment of Rates.

A party does not gain any settlement by reason of his having been assessed to and paid the watch-rate in the city of London. *Rea v. The Inhabitants of Christ Church, London*, M. 9 G. 4. 660

#### SETTLEMENT.—By Relief.

Relief given to a pauper while he is residing out of the relieving parish, is *prima facie* evidence of a settlement in that parish; and evidence of one instance in

which relief was so given, was held to be sufficient to warrant a finding by the sessions that the pauper was settled in the relieving parish, although upon a second application relief had been refused. *Rea v. The Inhabitants of Edwinstowe*, M. 9 G. 4. 671

#### SETTLEMENT.—By renting a Tenement.

1. Since the statute 6 G. 4, c. 57, in order to gain a settlement by settling upon a tenement, the reserved rent for one whole year (whatever be its amount) must be paid. *Rea v. The Inhabitants of Ashley Hay*, E. 9 G. 4. 27
2. The 59 G. 3, c. 50, requires, *inter alia*, that in order to acquire a settlement by the renting of a tenement, it shall consist of a separate and distinct dwelling-house or building, or of land, or of both, *bonâ fide* hired at and for 10*l.* a year at the least, for the term of one whole year, and that such house or building shall be held and the land occupied for the term of one whole year: *Held*, that a settlement was gained by a pauper hiring and holding for one year a distinct and separate dwelling-house, although part of the house was left to an unper-tenant. *Rea v. The Inhabitants of Great Bolton*, E. 9 G. 4. 71
3. A pauper, on the 6th of April 1823, hired a house for a year, at the rent of 12*l.* per annum, in the parish of A. In January 1824, he became chargeable to that parish, and was, by an order of justices, removed to the parish of B. There was no appeal against the order of removal. The pauper returned on the same day to his house in the parish of A., and continued to occupy it until the expiration of the year for which he had hired it, and paid the rent for the year: *Held*, that as the pauper had hired and held the house for a year, and paid the rent for that period, all the requisites of the statute 59 G. 3, c. 50, had been complied with, and that he gained a settlement in the parish of A. by renting a tenement. *Rea v. The Inhabitants of Barham*, E. 9 G. 4. 100
4. Since the 59 G. 3, c. 50, a settlement may be gained by a residence of forty days in the parish, provided the party comply with the conditions mentioned in that act. And, therefore, where a pauper since that statute hired land for a year, at the sum of 10*l.*, and paid that rent, and occupied the land for the whole year, but resided only forty days in the parish, and not upon the land, it was held that he gained a settlement. *Rea v. The Inhabitants of Wainfleet, All Saints*, E. 9 G. 4. 227
5. Upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l.* per annum and paid rent for the same, the respondents, in order to show that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness on cross-examination, having stated that no letting was by a written instrument, it

was held, that it could be proved only by the production of that instrument. *Rez v. The Inhabitants of Rawden*, M. 9 G. 4.

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**SETTLEMENT—By serving an office.**

An assistant overseer, elected and appointed under the provision of the statute 59 G. 3, c. 12, at an annual salary of 10*l.*, will gain a settlement by serving such an office for a year. But the appointment in writing, under the hands and seals of the justices, to such an office, with an annual salary annexed to it, requires a stamp of 2*l.* *Rez v. The Inhabitants of Law*, M. 9 G. 4. 655

**SHERIFF.**

1. In March the then sheriff of London seized the goods of a debtor by virtue of a *feri facias*. An officer was put in possession of the goods, but the execution creditor directed the sheriff not to sell, and the debtor continued to have the control of his goods until November, when another execution creditor sued out a *feri facias*, directed to the succeeding sheriffs of London: *Held*, that the latter were bound to levy under this second *feri facias*, and that it was their duty, when they found the officer of the former sheriff in possession, to inquire into the facts, and if they had done so they would have learnt that the first execution was fraudulent. *Lovick v. Crowder*, E. 9 G. 4. 132

2. Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a *fi. fa.*, under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution creditor: *Held*, that he was not justified in paying over the money, and was liable to be sued for it by the assignees in an action for money had and received.

*Quære*, whether the sheriff was justified in selling the goods after notice of the bankruptcy. *Notley and Others, Assignees, v. Buck*, E. 9 G. 4. 160

3. A creditor had obtained judgment by default against his debtor since the statute 6 G. 4, c. 16, s. 108, and the goods having been seized by the sheriff, but not sold until after an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. *In re Washbourne*, T. 9 G. 4. 444

4. A *feri facias* issued against the goods of A. The goods were seized by the bailiff. The execution creditor authorised the bailiff to quit possession, the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Before the sale, another *feri facias* issued at the suit of a second creditor. To

that writ the sheriff returned *nulla bona*. The second creditor brought an action for a false return, and recovered the value of the debtor's goods against the sheriff. The sheriff, having previously paid the value of such goods to the creditor under the first *fi. fa.*, brought an action to recover from him that money: *Held*, that he was entitled to recover the same, unless it were shown by the defendant, that at the time when the sheriff made the payment he was acquainted with the fact of the misconduct of his officer; and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with the knowledge of the misconduct of his officer. *Crowder and Another v. Long, Gent., One., &c.*, M. 9 G. 4. 598

**SHIP-OWNER.**

*See* CHARTER-PARTY.

**SIMONY.**

Where a party was presented to a rectory, in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void, on the ground that it was simoniacal, and the king then presented A. B., and he was instituted and inducted: *Held*, that he might maintain ejectment for the rectory, against the person who had been simoniacally presented. *Doos on the demise of Watson, Clerk, v. Fletcher*, E. 9 G. 4. 25

**SPEAKER'S CERTIFICATE.**

*See* EVIDENCE, 15.

**SPECIAL VERDICT.**

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**STAKEHOLDER.**

Where A. and B. deposited money in the hands of a stakeholder, to abide the event of a boxing-match between them; and after the battle A. claimed the whole sum from the stakeholder, and threatened him with an action if he paid it over to B., which he nevertheless did by the direction of the umpire: *Held*, that A. was entitled to recover from him his own stake, as money had and received to his use. *Hastelow v. Jackson*, E. 9 G. 4. 221

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*Held*, by Lord Tenterden, C. J., at Nisi Prius, that it lies upon the defendant to show that he was residing in Wales at the time when the writ or meane process was served on him in the action, and that general evidence that his usual place of residence both before and subsequent to the commencement of the action was in Wales was not sufficient. *Jones v. Kenrick*, T. 9 G. 4.

### WHARFAGE.

By an act of parliament certain persons were incorporated as the Hull Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorised to make a dock, quays, wharfs, &c., which it was enacted should be vested in them for the purposes of the act. Amongst other things it was provided, that "all goods, &c., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that act, should be liable to pay, and should be charged and chargeable with the like rates of wharfage and payments as were usually taken or received for any goods, &c., loaded or discharged upon any quays or wharfs in the port of London." *Held*, that as the premises were only vested in the company for the purposes of the act, they had no common-law right to a compensation for the use of them; and that the statute did not give them any right to claim wharfage for goods shipped off from their quays. *The Dock Company at Kingston-upon-Hull v. La Marche*, E. 9 G. 4.

### WILLS.

*See* EVIDENCE, 3, 7.

### WITNESS.

*See* BANKRUPT, 3. BILL OF EXCHANGE, 5. EVIDENCE, 14, 15.

### WORK AND LABOUR AND MATERIALS.

*See* ASSUMPSIT, 3.



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C A S E S  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,  
AND  
OTHER COURTS,  
IN  
TRINITY TERM,

In the Ninth Year of the Reign of GEORGE IV.—1828.

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CALVERT v. TOMLIN.—p. 1.

Where a cognovit was given on the 8th of February in Hilary term, with a condition that judgment should not be entered, unless default should be made in payment on the ensuing 1st of April, and the defendant died in Hilary vacation, before the 1st of April, judgment entered up on the 10th April in Hilary vacation, after defendant's death, was held regular, as relating to the first day of Hilary term, as also execution tested of a day in that term anterior to the defendant's death.

THE defendant, on the 8th of February, in Hilary term last, gave a cognovit for 50*l.*, with a condition "that no judgment should be entered up or execution issue, unless default were made in payment the 1st of April next."

On February 16th, he died. The plaintiff, on the 10th of April, in Hilary vacation, entered up judgment, and issued a *fi. fa.* tested in Hilary term, of a day anterior to defendant's death.

*Wilde*, Serjt., obtained a rule nisi to set aside this judgment and execution, as having been entered up and issued after the death of the defendant.

*Cross*, Serjt., showed cause. The judgment has relation to the first day of Hilary term, which was anterior to the defendant's death; and the writ being also tested of a day anterior to his death, the proceedings are regular. A cognovit is a mere acknowledgment of a debt, which authorises the plaintiff to sign judgment at any time, and is different from a warrant of attorney: *Wyborne v. Ross*, 2 Taunt. 68. In *Bragner v. Langmead*, 7 T. R. 20, 24, it was laid down that a judgment signed in any part of the term, or the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed; and that an execution against the goods of the defendant may be taken out upon it, tested the first day of the term. And in *Waghorne v. Langmead*, 1 B. & P. 571, it was holden that if a *fi. fa.* were tested before defendant's death, but delivered to the sheriff and executed after, the execution was regular.

*Wilde*. That was a case in which a verdict had been taken, and the  
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statute expressly provides for entering up judgment in case of death after verdict ; but there is no case which sanctions the entering up judgment as of a day prior to the day on which the plaintiff's right to judgment accrues : here, by express agreement, judgment was not to be entered up unless default were made in payment on the 1st of April ; the party, therefore, had no right to judgment till that day. A judgment upon a cognovit is subject to the same rules as a judgment upon a warrant of attorney ; and it is said in the books of practice, "If the first day of the term of which the judgment is signed, and to which the judgment has relation, be previous to the time stipulated in the defeasance, &c., for the entry of the judgment, although judgment were not actually signed till afterwards, the Court would probably set aside the judgment," 2 Archb. Pr. K. B. 23. In applying to sign judgment on an old warrant of attorney, it is always stated that the party was alive on a day in term prior to the application ; and if it appears that he is dead, the Court will not allow judgment to be signed. In the present case, if the defendant had been alive, the plaintiff could not have signed judgment in Hilary term, and the death of the defendant cannot put him in a better situation. Such a judgment by relation would interfere with the rights of other parties,—as, of executors,—which accrued on the death of the defendant ; and it was to prevent such consequences that the statute has required the day of signing judgment to be entered in the margin of the roll.

BEST, C. J. As the law stands at present, a cognovit is revoked by the death of the party, although it is difficult to find a satisfactory reason for this, since the party has nothing more to do after giving the cognovit, which distinguishes it from the case of a submission to an award. The courts, however, have allowed a fiction to prevail for the furtherance of justice, and in *Bragner v. Langmead*, it was decided, that a judgment signed in any part of the term or subsequent vacation, relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed ; and that an execution against the goods of the defendant might be taken out upon it, tested the first day of the term.

So in *Waghorne v. Langmead*, it was holden, that if a fi. fa. were tested before defendant's death, but delivered to the sheriff and executed after, the execution was regular.

These cases are direct authorities in support of the present judgment, unless there be any thing in the circumstance, that if the party had been alive, the money could not, according to the agreement, have been levied during that portion of the term which elapsed previously to his death. The learned writer who makes the distinction, does not cite any case, and it does not appear in the decisions I have mentioned, whether the judgment could have been entered up before the death of the party or not. In the present instance, the money was not levied in fact till after the period at which, according to the agreement, it was to be paid ; and if a judgment entered up at that time will relate to a period prior to the death of the party, we have all that justice and forms require. The proceedings have been regular, and the rule must be discharged.

PARK, J. I am of the same opinion. The cases which have been cited are decisive of the point. The teste of the writ corresponded with the judgment in being anterior to the death of the party, and the judgment, though not entered up till the money was payable, having relation to the first day of term, the proceedings must be esteemed regular, according to the case of *Bragner v. Langmead*.

BURROUGH, J. The debt was ascertained in the lifetime of the party, and time was given to pay it till April 1st. The intent of the parties was, that, at all events, judgment should be entered up, although time was to be allowed for the payment of the debt. The judgment, when entered up, has relation to a time when the defendant was living, and the proceedings are, therefore, regular.

GASELEE, J. I think the proceedings are regular. There is a distinction between a cognovit and a warrant of attorney. When judgment is entered up on a warrant of attorney, it must be shown that the party is living, because if the Court know him to be dead, they will not allow judgment to be signed. But where there is already a confession of the debt on record, the plaintiff does not want the authority of the Court to enter up judgment, which follows as of course upon the cognovit.

Rule discharged.

### JOHNSON v. GILLETT.—p. 5.

The Court of C. P. has not authority under the 6 G. 4, c. 16, s. 96, to compel parties to enrol the proceedings under a commission of bankrupt. The application must be made to the Court of Chancery.

WILDE, Serjt., moved for a rule nisi, to compel the defendant to enrol the proceedings under a commission of bankrupt, pursuant to 6 G. 4, c. 16, ss. 95, 96, by which it is enacted, "That all things done pursuant to the act passed in the fifth year of King George the Second, and hereby repealed, whereby it was enacted, that the Lord Chancellor should appoint a place where all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed; and the Lord Chancellor shall be at liberty from time to time, by writing under his hand, to appoint a proper person, who shall by himself or his deputy (to be approved by the said Lord Chancellor), enter of record all matters relating to commissions, and have the custody of the entering thereof," and "that in all commissions issued after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid." But

The Court were clearly of opinion that the application ought to be made to the Court of Chancery, and that this Court had no authority under the section.

Rule refused.

### LAWRENCE v. HOOKER.—p. 6.

In an action between A. and B., the Court refused a rule to compel B. to produce, for the purpose of stamping, an agreement between B. and C., although by an affidavit of C.'s it appeared that the act complained of by A. arose out of this agreement.

TROVER for a horse and harness.

Wilde, Serjt., moved for a rule calling on the defendant to show cause why the *venue* in this action should not be changed; and why an agreement

entered into with the defendant by one Jee, and in the hands of the detenant, should not be produced to the commissioners of stamps to be stamped.

The motion was made on affidavit by Jee, that by the agreement in question he had upon certain conditions authorised the defendant to remain in possession of certain articles distrained by the defendant for rent due from Jee to the defendant (and among them the plaintiff's horse and harness), for a longer time than that allowed by law for the detention of distresses: and that the plaintiff's horse and harness had by this means been sold under the distress, instead of Jee's household furniture, which would have sufficed to discharge the rent.

*Wilde* distinguished the case from those in which the Court had refused to compel parties in possession of instruments, to produce them for the purpose of being inspected or copied; and urged the hardship of a plaintiff's case resting on the proof of an agreement, on the production of which he would be nonsuited for want of a stamp, which the defendant had purposely omitted to supply.

*The Court*, however, thought it would be dangerous to interfere thus with the rights or liabilities of third persons; and putting the case of a party who might innocently have entered into an illegal agreement, and have abandoned it upon discovering its illegality,

Refused the rule as to the production of the agreement.

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#### REVETT v. BROWN. — p. 7.

The plaintiff, who had built a chapel, conveyed it to defendant by a deed, the validity of which was questionable. Defendant took possession, and gave the key to a gardener, who, with his permission, lent it to the plaintiff to preach in the chapel. The plaintiff thereupon locked the chapel, and refused to re-deliver the key: Held, that he had not sufficient possession to maintain trespass.

**TRESPASS** for breaking and entering a chapel. The defendant justified the trespass under Hudson, who was alleged to be the owner of the freehold.

At the trial, before *Garrow*, B., Suffolk Summer assizes, 1827, it appeared that plaintiff had built the chapel, but afterwards, being in embarrassed circumstances, he conveyed all his property, including the chapel, as it was alleged, to Hudson, in trust for the payment of plaintiff's creditors. The deed was executed with a blank, for a sum alleged to be due to one Mills, which blank was afterwards filled up with the sum of 14,858*l.* as a balance due to Mills, the recital of the deed stating that a balance had been adjusted between him and the plaintiff.

Hudson, who was put into possession under this deed, left the chapel in the care of a gardener, to whom he delivered the key, with permission to allow the plaintiff to preach in the chapel.

The plaintiff, who had been accustomed to preach in the chapel, borrowed the key of the gardener for that purpose, and then, having locked the chapel up, refused to re-deliver the key, whereupon the defendant, by Hudson's orders, broke the chapel open. The gardener had been accustomed to lend the key to preachers of various persuasions, who frequently preached in succession, on the same day.

The validity of the deed was much disputed at the trial; but without giving any opinion on that point, the learned Baron left it to the jury to say whether the plaintiff was sufficiently in possession of the premises to maintain trespass against a wrong-doer. Subject to this question, which was also reserved for the Court, a verdict was found for the plaintiff; which

*Storks*, Serjt., moved to set aside, and enter a nonsuit instead, on the ground that the possession of the premises, if not the complete title, was in Hudson.

*Wilde*, Serjt., showed cause, and argued that the deed to Hudson was void by reason of the filling up the blank after execution, and that, therefore, Hudson took nothing under it. No opinion, however, was given on this point; the decision of the Court turning altogether on the question, Whether the plaintiff had a sufficient possession to maintain trespass.

**BEST, C. J.** The plaintiff had not such a possession as would entitle him to sue in trespass. Possession alone is indeed sufficient for that purpose, as against a wrong-doer; but then it must be a clear and exclusive possession. Now, the gardener had the key of the chapel, not from the plaintiff, but from Hudson, and he delivered it to the plaintiff, not as a symbol of possession, but merely for the purpose of preaching. If that were sufficient, any person who preaches in a chapel might maintain trespass against the owner. This rule must be made absolute.

**PARK, J.** If the plaintiff had enjoyed the constant and exclusive use of the chapel, the case might have been different; but the key was delivered to the gardener with permission to allow the defendant to preach, and many others preached there also. This was not sufficient evidence of possession to go to the jury.

The rest of the Court concurred, and the rule was made

Absolute.

---

### WOOD v. NUNN. — p. 10.

A landlord, to whom rent was in arrear, hearing his tenant and a stranger disputing about the property of an article on the premises, early in the morning entered and said, "The article shall not be removed till my rent is paid." The stranger, nevertheless, removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent:

Held, that the distress was sufficiently commenced by the landlord to entitle him to the article in question.

**TROVER**, for a lathe. At the last Cambridge Summer assizes, before *Alexander, C. B.*, it appeared that the lathe in question was in the house of one Saunders, who owed the defendant two years' rent.

One morning, between six and seven o'clock, the defendant, hearing that the plaintiff was about to remove the lathe, entered Saunders's house, where he found the plaintiff and Saunders, who had formerly been partners, disputing about the property in the lathe, the plaintiff endeavoring to remove it as his own, under an award, and Saunders averring that he would die by the lathe rather than suffer it to be removed; upon which, the defendant, laying hands on the machine, said, — "I will not suffer this or any of the things to go off the premises till my rent is paid." The plaintiff, nevertheless, succeeded in carrying the lathe off the premises; but the defendant, about twelve o'clock the same day, made a formal distress, by his bailiff, of the goods in Saunders's shop, and caused the lathe to be retaken and brought back to the shop.

On the part of the plaintiff it was urged, that there had been no distress till the defendant sent his bailiff, and, the lathe having been carried away before that time without fraud, on a bona fide assertion of property, the defendant had no right to retake it. The learned Chief Baron

thought the distress was sufficiently made by what fell from the defendant upon his entering Saunders's house early in the morning, and said it would be a strange state of law if a landlord, finding the goods on the premises in peril of being removed, could not commence a distress at once, and complete the formal part of the proceeding afterwards. A verdict having been found for the defendant,

*Wilde*, Serjt., obtained a rule nisi for a new trial, which the Court, without hearing the other side, now called on him to support. He urged, that the lathe belonging to the plaintiff, and having been detained on the premises by the wrongful resistance of the tenant, the landlord had no right to seize it. If he were allowed to do so, a landlord and tenant might always collude, to satisfy rent with the property of a stranger.

But the lathe was removed bona fide before the distress took place; for the defendant, by sending his broker or bailiff at twelve, showed clearly, that in his view of the affair, no distress had been made in the morning.

*BEST*, C. J. There was no collusion here between landlord and tenant, for Saunders claimed the lathe for himself, and not for his landlord; nor is it true that the lathe was removed before the distress commenced. The distress commenced when the landlord came on the premises, and said, "This shall not go till my rent is paid." From that time the property was in the custody of the law, and being improperly removed, the landlord had a right to get it back. The verdict for the defendant must stand.

*PARK*, J. There was no collusion between the landlord and tenant, and there is no ground for making the rule absolute.

*BURROUGH*, J. The distress commenced when the landlord came on the premises; and as he was not privy to the transactions between the plaintiff and Saunders, the rule must be discharged.

*GASELEE*, J. The lathe was on the premises in the morning, when the landlord came, and he was entitled to distrain it. There is no necessity for entering into the supposed case of a tenant bringing property on the premises for the purpose of its being distrained. No such fact appears in the present case, and the rule must be

Discharged.

---

### WHALE v. LENNY and Others, Assignees.—p. 12.

In an action against the assignees of a bankrupt, the Court refused to permit defendants to plead non est factum, and that the premises did not come to them by assignment.

**CONVENANT** against the defendants, as assignees of a bankrupt. Proffer excused, on the ground that the deed was in the possession of the defendants.

*Jones*, Serjt., moved to plead several matters, viz., first, non est factum; second, that the deed was not in the possession of the defendants; third, that the premises did not come to the defendants by assignment; fourth, performance.

*The Court* refused to allow non est factum, and that the premises did not come to the defendants by assignment, to stand together, and put Jones to his election when he abandoned the non est factum.

Upon a former day the Court gave out, in a case which was not pressed to a decision, that where a title was deduced through a number of successive links, they would only allow the defendant to traverse the material allegation, and not to take issue on every distinct averment of fact immaterial to the decision of the cause.—See *Gully v. Bishop of Exeter*, post, p. 42.

### FIELD and Others v. CARR. — p. 13.

Defendant accepted a bill of exchange drawn by C., who indorsed it to his bankers; they entered it on the credit side of C.'s account, but, the bill having been dishonored, entered it afterwards on the debit side. A few days after this dishonor, defendant paid to C. the amount of the bill, but omitted to take it out of the banker's hands.

C. subsequently paid in to the banker, on his general account, more than enough to cover all the items of the account preceding the bill item, and that item also, and the bankers, for a space of three years, treated the bill as paid; they then sued defendant on his acceptance:

Held, that he was not liable.

THIS was an action on two bills of exchange drawn by Thomas Crawshaw, payable at four months after date, on the defendant, and accepted by him. They became due February 22, 1823, and amounted together to 132*l.* 4*d.*, the price of certain wool which defendant had bought of Crawshaw. These bills Crawshaw indorsed to the plaintiffs, his bankers, who, before they became due, entered the amount of them to his credit as cash. When due they were dishonored; upon which the plaintiffs entered to Crawshaw's debit an equal sum, as for bills returned.

In April, 1823, a few days after the bills were due, defendant paid the amount of them to Crawshaw, but neglected to require him to deliver up the bills.

Crawshaw continued his banking account with the plaintiffs, and by the 13th of January, 1824, had paid in to his own credit a sufficient sum to cover all the items placed to his debit up to that date, including the amount of the above bills. There was no specific appropriation of these payments to any particular debit; but the balance against him, upon a settlement of accounts at the end of the year 1823, was 526*l.* 9*s.*; at the end of 1824, 1061*l.* 9*s.*; and at the end of 1825, 426*l.* 2*s.* 10*d.* The balances were July struck, and no demand was made in respect of these bills. In April, 1826, Crawshaw became bankrupt; the plaintiffs proved their full demand against him under the commission, and deposed that they had received no security or satisfaction whatever, save and except certain bills of exchange referred to in the deposition, and which were not the bills in question. From the time the bills became due, to the commencement of this action, in 1827, no demand was ever made by the plaintiffs on the defendant in respect of the bills.

Upon the trial, before *Bayley, J.*, York Summer assizes, 1827, a verdict was found for the plaintiffs. Whereupon,

*Jones, Serjt.*, obtained a rule nisi to set it aside upon affidavits disclosing the state of the accounts between Crawshaw and the plaintiffs, and some other matters in respect of which the defendant had been surprised at the trial.

*Spankie, Serjt.*, who showed cause against the rule, argued that the



plaintiffs always held these bills as an additional security; that the acceptor could not be discharged except by payment to the holder; and that, therefore, the plaintiff's claim did not fall within the rule in *Clayton's case*, 1 Mer. 572. If any of the money paid in by Crawshaw had been paid in respect of these bills *nominatim*, they would have been given up; and if none was paid in respect of them *nominatim*, although payments on account would extinguish general items of account in order of priority, they would not extinguish distinct outstanding securities.

*Jones*. The plaintiff's claim falls precisely within the rule in *Clayton's case*; for though the defendant inadvertently omitted to demand his acceptances of Crawshaw when he discharged them, yet the amount of the bills formed one item in the general account between the plaintiffs and Crawshaw, and therefore was extinguished in order of priority by the sums paid in. *Bodenham v. Purchas*, 2 B. & A. 39, and *Simson v. Ingham*, 2 B. & C. 65, are in point.

The conduct of the plaintiffs is an admission that they considered it so extinguished, for balances were struck for three years successively without any demand in respect of the bills, and they were never mentioned when the plaintiffs proved their debts against Crawshaw upon his bankruptcy.

*Best*, C. J. Upon the principle established in *Clayton's case*, and recognised in *Bodenham v. Purchas*, and *Simson v. Ingham*, the defendant is entitled to have this rule made absolute. The action is brought on two bills of exchange drawn by Thomas Crawshaw on the defendant, at four months' date, and accepted by him. They were given for the price of certain wool purchased by the defendant of Crawshaw, and indorsed by Crawshaw to the plaintiffs, his bankers. In April, 1823, shortly after the bills became due, the defendant paid the amount of them to Crawshaw, but neglected to require him to deliver up the bills. That payment alone would not have discharged the defendant, the plaintiffs having been at that time the holders, and entitled to the amount of the bills. But the ground on which the defendant is entitled to have this rule made absolute is, that the plaintiffs not only entered the bills to the debit of Crawshaw, but treated them as having been paid; and if so, according to the rule in *Clayton's case*, the defendant is discharged. There is indeed an exception to that rule, but the exception does not apply here. *Bayley*, J., says, 2 B. & A. 45, "The principle is this, that where there are distinct accounts, and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but where the accounts are treated as one entire account by all parties, that rule does not apply."—"It certainly seems most consistent with reason, that where payments are made upon one entire account, such payments should be considered in discharge of the earlier items." The Master of the Rolls says, "In such a case," (that is, a banking account,) "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other."

Neither the Master of the Rolls nor *Bayley*, J., say that such act is conclusive. It is undoubtedly open to the party to show a payment on account of the particular bill, but in the absence of proof of any such application of the sums paid in, the first payments must be applied to the discharge of the first debts. In the present instance, although there was

always a balance against Crawshaw, yet enough had long since been paid in to discharge all the items of the account preceding the bills, and the bills also. And the defendant's case is stronger than those which have preceded it, because in 1823, 1824, and 1825, the plaintiffs treated these bills as paid. In 1826, when Crawshaw became bankrupt, nothing was said about the bills, and it was not till 1827, that the plaintiffs thought of calling on the defendant. Under these circumstances, it would be inconsistent with every principle of law and honesty, that the plaintiffs should recover. The rule settled by Sir W. Grant has received the sanction of every court in Westminster Hall.

PARK, J. The rule in *Clayton's* case has been adopted by all the courts in Westminster Hall, and the only question is, Whether the facts here come within it. I am of opinion that they do, and that the case is pregnant with circumstances in favor of the defendant.

GASELEE, J. (a) The question is, whether, under all the circumstances, the plaintiffs' claim has been destroyed? I think it has by their own conduct; and in that view it is not material whether they have been paid by Carr, or not. By the course of their accounts it is admitted that they have been paid by Crawshaw.

Rule absolute.

### ARCHBISHOP of TUAM v. ROBESON and Another. — p. 17.

It is a libel to publish of a Protestant Archbishop, that he attempts to convert Catholic priests by offers of money and preferment.

**LIBEL.** The declaration stated that the plaintiff, at the time of publication, was, and still is, Archbishop of Tuam:

That at the time of publication one Thomas Maguire acted as a priest of the Roman Catholic church in Ireland:

That the plaintiff had acted honorably as Archbishop:

That the plaintiff never promised nor offered to Maguire, nor to any person, any sum of money as an inducement for him to cease to act as a priest of the Roman Catholic church, or to accede to become a Protestant clergyman; nor a living of 800*l.* a year, nor any living for such a purpose; nor did he ever offer any living, but in the due discharge of his duty as Archbishop:

Yet the defendants, well knowing the premises, but contriving and maliciously intending wrongfully to injure the plaintiff in his good name, fame, credit, and reputation, and in the respect and good opinion which he had obtained, and to bring him into public scandal and disgrace, and to cause it to be believed that the plaintiff had misconducted himself as such Archbishop as aforesaid, and had promised to the said Thomas Maguire a large sum of money and a living of 800*l.* a year, and that the plaintiff had written to a Protestant clergyman to make such offer, in order to induce the said Thomas Maguire to accede to become a Protestant clergyman, did, on the 8th of November, 1827, at Westminster, &c., falsely, wickedly, and maliciously, print and publish, and cause and procure to be printed and published, in a certain newspaper called the *Morning Herald*, a certain false, scandalous, and malicious libel, of and concerning the plaintiff, and of and concerning the conduct of the plaintiff as Archbishop, and of and concerning the plaintiff's supposed offer to the said Thomas Maguire as aforesaid, containing therein the false, scandalous, malicious, and libel-

(a) *Burroughs, J.*, was at chambers.

lous matter following, of and concerning the plaintiff, and of and concerning the conduct of the plaintiff as such Archbishop as aforesaid, and of and concerning the plaintiff's supposed offer to the said Thomas Maguire as aforesaid; that is to say,

"Ireland: Dublin, November 5th. The speech of the Rev. Mr. Maguire (a) at the Roscommon Catholic meeting, has excited a prodigious sensation. The second Reformation did not need this last shock to destroy it, but now that it has come, a vestige of the fabric does not remain. Who do you think was the Archbishop who promised Maguire, the priest of the mountains, 1000*l.* in cash, and a living of 800*l.* a year? Why, no less a personage than the Archbishop of Tuam!!! This statement I received this day from Mr. M. himself. The Archbishop wrote to a Protestant clergyman desiring him to make the offer, and to show the letter; but not to surrender it into his possession, unless Maguire was disposed to accede; and the induction into the living was to take place within eight days! All these facts are capable of proof, and will be proved, if their authenticity is denied. A writ has been served on him by a country innkeeper, at whose house he resided for about three months, three years since, (when he first took possession of his miserable parish,) for the seduction of his daughter. As a proof of the fairness of the saints, it may be observed, that with the 5000 copies of the published report of the discussion between Pope and Maguire, which they printed, they have bound up Dr. Otway's Strictures on the Arguments!!! The Report, it was understood, should go out on its own merits;"

Meaning, by the said libel, that the plaintiff had offered the said Thomas Maguire 1000*l.* in cash and a living of 800*l.* a year, if the said Thomas Maguire would accede to become a Protestant clergyman.

There were other counts, but the innuendo was the same in all; and though the introductory statements differed, none of them stated any matter of fact as explanatory of the libel, except that the plaintiff was Archbishop of Tuam, and that Maguire had acted as a Roman Catholic priest.

The defendants pleaded the general issue; and a verdict with 50*l.* damages having been obtained for the plaintiff,

*Taddy*, Serjt., moved to set it aside and enter a nonsuit, or arrest the judgment.

There is no introductory statement to show what is meant by "the Roscommon meeting," "the second reformation," or the "living of 800*l.* a year," which, for aught that appears to the contrary, might be a living which it might have been proper for the plaintiff to bestow on Maguire. It is not averred, even, that he was a priest. An allegation of fact cannot be made in an innuendo: *Goldstein v. Foss*, 4 Bingh. 489. Such allegations as are necessary to explain the libel must be clearly made in the introductory statement, and then be referred to by innuendo: the general innuendo, therefore, at the end of the first count, will not assist the plaintiff, and for want of a substantive explanatory statement the alleged libel is without a meaning.

But supposing it otherwise, there is no imputation on the plaintiff's character in the conduct ascribed to him. To make converts, even by purchase, is a praiseworthy effort of religious zeal, sanctioned by act of parliament, and warranted by the practice of our own and other Christian establishments. There are numerous statutes by which sums of money are provided for converted Catholic priests; the last allows 40*l.* for each such priest till he shall have been provided for by the bishop of the diocese; and at Rome

(a) The innuendos of identity are omitted to avoid prolixity.

a Jew is paid annually by the pope for making public profession of conversion.

A writing is no libel unless some crime be imputed, or unworthy motives, or something likely to exclude a party from society: *Lord Kerry v. Thorley*, 4 Taunt. 355. The imputation on the plaintiff, if any, is only of extraordinary zeal.

Barr, C. J. Probably the declaration might have been more accurately drawn; but after verdict, the question is, Whether enough appears on the record to sustain the action. It is not easy to perceive why any distinction should be made between written and oral slander; but the case referred to, *Lord Kerry v. Thorley*, has established it too firmly to be shaken. According to that case, in order to support an action for oral slander, something criminal must have been imputed; but in a libel any tendency to bring a party into contempt or ridicule is actionable, and, in general, any charge of immoral conduct, although in matters not punishable by law. Is, then, immoral conduct imputed to the plaintiff by this libel? (After reading this libel his Lordship proceeded :) Maguire is represented as having said that the plaintiff had offered him 1000*l.* and a living of 300*l.* a year if he would change his faith; and the whole statement concludes, "All these facts are capable of proof, and will be proved, if their authenticity be denied." Among these facts is the disgraceful employment of a church of England clergyman to tamper with the conscience of a priest, and the misapplication of Church of England preferment; for such we must take it to be, as the archbishop would have no other in his gift. Would it be immoral in the archbishop if he attempted to bribe a man to renounce his religion, and to endow such a proselyte with Church of England preferment? Would it be immoral to employ, in making hypocrites, funds destined to the support of the Protestant Church? If the seduced be guilty, it is impossible to say that the seducer is innocent. But it has been urged, that nothing immoral is imputed, since the legislature has held out to Catholic priests the same kind of temptation to become Protestants. Even if that were so, it would not persuade me that such a course was moral. But the legislature has not done this; it has only said, that if a man be converted he shall not be left to starve in the midst of a hostile community. The legislature has provided a maintenance for him, not to persuade him to become a convert, but to support him when converted: the sum allowed is too small to operate as a temptation to insincerity. We collect, therefore, from this record, that there is a charge reflecting on the moral conduct of the archbishop; a charge which, if true, ought to exclude him from the situation which he fills. But we have been referred to the case of *Goldstein v. Foss*, and have been told that the record is defective in introductory averments to support the various innuendoes. However, neither the facts nor the judgment in that case interfere with the present decision. There the declaration alleged, that whereas divers persons had been associated together under the name of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers," and the defendant, under pretence of being secretary of the society, had, from time to time, published printed reports for the purpose of announcing to the society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed as members of the society; and whereas the plaintiff was a merchant of good character; yet the defendant falsely and maliciously

published of and concerning the plaintiff, in his trade and business, the following libel:—

“Society of Guardians for the Protection of Trade against Swindlers and Sharpers. — I, E. F., am directed to inform you that the persons using the firm of Goldstein (meaning the plaintiff) are reported to the society as improper to be proposed to be balloted for as members thereof;” thereby meaning that the plaintiff was a swindler and a sharper, and an improper person to be a member of the said society: and it was held that the innuendo could not be supported without a previous averment that it was the custom of the society to designate swindlers and sharpers by the terms “improper persons to be members of that society.” The libel in that case was different from the present in this respect, that on the face of it there was no imputation of immoral conduct. There is quite enough in the language here to constitute this a libel after verdict.

PARK, J. I am of the same opinion. Sufficient is stated here to render this a libel on the plaintiff. The paper charges an archbishop, not with endeavoring to extend the Protestant faith, but with having selected a person who was under a charge of seduction, for the ministry of a Protestant church, and with offering to reward him, not for a sincere conversion, but for a colorable profession of conformity. That is the gist of the allegation, and that is a libel. An innuendo without previous explanation will not, it is true, make that a libel which is not otherwise libellous; but the imputation of immoral conduct is sufficiently clear on the present record.

BURROUGH, J. If we are to understand the language of this attack as the rest of the world would do, there can be no doubt it is a gross and infamous libel. The plaintiff is charged with having sought to induce an improper person to abandon his religious creed, not by reasoning, but by a gross bribe. The libel is such as not to need explanation, and the innuendoes are sufficient.

GASELEE, J. The misconduct laid to the plaintiff's charge is, the having offered to a Catholic priest 1000*l.* and a living of 800*l.* a year, to become a Protestant. It has been urged, that there is no preliminary allegation sufficient to warrant such an innuendo; but it is alleged that the defendant, seeking to cause it to be believed that the plaintiff, as archbishop, had promised Maguire 1000*l.* and a living of 800*l.* a year, and had written to a Protestant clergyman to make such offer to induce Maguire to become a Protestant, published of and concerning the conduct of the plaintiff, and of and concerning the plaintiff's said supposed offer, the libel following. That is a sufficient allegation of the offer to which the libel refers; for in *Rex v. Horne*, Cowp. 672, in an indictment for a libel on the king and his troops, it was held a sufficient allegation, that the libel was published of and concerning the king and his troops. The jury have found that this was published of and concerning the plaintiff, and that gets rid of the objection to the frame of the declaration. As to the merits, this is equally a libel, whether it proposed to impute to the plaintiff indiscretion or dishonesty; the manifest object of it was to bring him into disrepute. It charges him, also, with a consciousness of incorrect conduct, because it is alleged that he desired his letter not to be shown.

Rule refused.

## PREECE v. CORRIE. — p. 24.

Avowant, who had a term which expired on the 11th of November, 1826, let the premises orally from the 11th of September to the 11th of November, in that year, for 270*l.*, payable immediately:

Held, that this was a lease, of which parol evidence might be given, and not an assignment requiring a writing; but that, being a demise of the whole of avowant's interest, he had no right to distrain.

To a cognizance by the defendant for rent-arrear from the plaintiff, as tenant to Thomas White, under a demise for a certain term, to wit, from the 11th day of September, 1826, till the 11th of November in the same year, the plaintiff pleaded,

First, that he did not hold the premises, as tenant to White, by virtue of the said supposed demise;

Secondly, that by the said supposed demise, White demised and granted the premises to the plaintiff, for all the residue and remainder of his, White's, estate, term, and interest in the same, and that he had not, at the time when, &c., or at any time during the supposed demise to the plaintiff, any reversionary estate, term, or interest in the premises, expectant, or to take effect, upon or after the expiration of the term granted to the plaintiff by the supposed demise.

The defendant took issue on the first plea, and to the second replied, that White did not demise and grant the premises to the plaintiff, for all the residue and remainder of White's estate, term, and interest in the same; and on this issue was joined.

At the trial before *Littledale, J.*, Hereford Summer assizes, 1827, it appeared, that White had a term in the premises, which expired on the 11th of November, 1826; and that on the 11th of September in that year, in the completion of some arrangements between him and the plaintiff, he let the premises orally to the plaintiff, to hold till the same 11th of November, paying 270*l.* rent, immediately.

The jury found, first, that White demised to the plaintiff; secondly, that White parted with the whole of his term. The latter finding negating in effect the defendant's right to distrain, and so amounting to a verdict for the plaintiff,

*Russell, Serjt.*, moved to set aside the verdict and have a new trial, or enter a verdict for the defendant, on the ground that the plaintiff's plea of non tenuit had been found in favor of the defendant; and that no admissible evidence had been adduced in support of the second plea, which amounted in effect to an allegation, that Thomas White had assigned all his interest in the premises, and such an assignment could not, under the statute of frauds, be effected, except by writing. If the plea did not amount to an allegation of assignment, it must be taken to show an under-lease from White to the plaintiff; and in that case he would have been entitled to distrain.

A rule nisi was granted, against which *Ludlow, Serjt.*, was to have shown cause; but the Court called on

*Russell* to support his rule. He cited *Bac. Abr. Assignment*, to show that an averment in pleading that a person has parted with all his interest is equivalent to an averment of an assignment; and 2 *Inst.* 483, to show that the word *demise* was not confined to a granting by lease, but might apply to any other transfer of property. But if White had made an assignment it was void for want of a writing, *Botting v. Martin*, 1 *Campb.* 318, and evidence of it was not admissible. If the transfer did not amount to an assignment it was an under-lease; for in *Poultney v. Holmes*, 1 *Str.* 408, which had been recognised in *Smith v. Mapleback*, 1 *T. R.* 445, it was holden, that

where a man parted with all his interest in a term, but reserved a rent, the transaction amounted to an under-lease. If so, the defendant was entitled to distrain, and the second plea amounted indirectly to a plea of *nil habuit in tenementis*, which the law did not allow a lessee to plead against his lessor. *Alchorne v. Gomme*, 2 Bingh. 54.

BEST, C. J. There is no pretence for the motion. This was an action of replevin, and the defendant made cognizance as bailliff of White, alleging that the plaintiff held as his tenant under a demise, from 11th September, 1826, to 11th November in the same year, at a rent of 270l. To this there were two pleas: first, non tenuit; secondly, that White, by the demise mentioned in the cognizance, granted the premises for the whole of his estate in them, leaving no reversionary interest expectant on the determination of the term. Upon these pleas issue was joined. The jury found for the defendant upon the non tenuit; but on the last plea they found that there was a demise of White's whole estate.

Both findings are proper. At first sight it might appear, that, consistently with the second plea, non tenuit ought to have been found for the plaintiff: but this demise, though not entitling the lessor to distrain, ought to be considered as a lease, and not as an assignment; and in *Poulney v. Holmes* it was decided, that a party might sue in debt upon such a demise. This was a lease in fact, though even if it had been an assignment, it might have been received in evidence; for it would have been an assignment by operation of law, which the statute of frauds does not require to be in writing; but the transaction was in fact a lease, and the finding of the jury on both issues was proper. If the plea itself is bad, the defect is on the record, and the parties may proceed further; but on this we give no opinion. My brother *Park* (a) concurs as to the correctness of the finding. The rule must be discharged.

BURROUGH, J., was one of the same opinion.

GASELEE, J. In *Smith v. Mapleback*, the Court held that the lessor could not distrain upon a demise like the present, though it was held to be sufficiently a demise to entitle him to sue in assumpsit for the sum reserved.

Rule discharged.

(a) He was at chambers.

### SEATON v. BENEDICT. — p. 28.

1. Payment of money into court upon a general indebitatus assumpsit is no admission of a contract beyond the amount of the sum paid in.
2. A husband, who supplies his wife with necessaries in her degree, is not liable for debts contracted by her without his previous authority or subsequent sanction.

ASSUMPSIT for goods sold and delivered. The defendant pleaded the general issue, except as to 10l., which he tendered and paid into court.

By a bill of particulars, it appeared that the plaintiff's demand amounted to 28l. 5s. 6d., for kid gloves, ribbons, muslins, lace silks, and silk stockings, thirteen pair of which, of a very expensive description, were charged for, as having been delivered on one day.

At the trial, before *Burrough, J.*, Middlesex sittings after Hilary term last, it appeared that the defendant, a gentleman in the profession of the law, was, at the time when the plaintiff furnished the goods, living with his wife at Twickenham, and had supplied her wardrobe well with all necessary articles; that the plaintiff, a tradesman at Richmond, had, without the defendant's knowledge, furnished the defendant's wife with

the articles for which this action was brought, the greater part of which were delivered to her in the plaintiff's shop, and the remainder into her own hand at the defendant's door.

It did not appear that the defendant had seen her wear any of them, except, perhaps, the gloves and some of the silk stockings, the price of which did not amount to 10*l*.

On behalf of the defendant it was contended, that these articles were not necessary for the wife of a person in his degree; that no actual authority for them had been proved; and that an authority could not be implied for the purchase of any thing but necessaries.

The learned judge told the jury that he should have been of this opinion, but for the plea of tender; that plea admitted that the wife had authority to purchase some of the articles; and as it was not stated in respect of which of them the tender had been made, it must be taken to apply to all, admitting the authority to purchase them all, and contesting only the price at which they were charged.

A verdict, therefore, was taken for the plaintiff for 18*l*. 5*s*. 6*d*., with leave for the defendant to move to set it aside, if the learned Judge should be thought to have given an effect to the tender which it ought not to have.

*Wilde*, Serjt., accordingly obtained a rule nisi for a new trial, on the ground that the goods furnished were not necessaries, and that no authority could be implied from the tender, except an authority to purchase goods to the extent of 10*l*.

*Taddy*, Serjt., showed cause. The finding of the jury decides that the articles in question were necessaries in the defendant's station; and his authority for the purchase of them must be implied from the tender. The tender admits the existence and validity of the contract made by the wife; and as it does not distinguish any particular articles in respect of which the money has been paid into court, it must be taken that the only matter in dispute is the amount of the price. In *Bennett v. Francis*, 2 B. & P. 550 where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally upon a declaration containing a count for goods sold and delivered, it was held he admitted the transaction to have been converted into a contract. In *Montague v. Benedict*, 3 B. & C. 631, where the husband was held not liable, the articles were not necessaries; and in *Holt v. Brien*, 4 B. & A. 252, and *Bartley v. Griffin*, 5 Taunt. 356, the credit was given to the wife. If this were the case of any other agent, as of a servant, no doubt could be raised, after the tender, of the validity of the contract.

*Wilde*. The tender does not admit a contract beyond the amount of the sum paid into court, *Cox v. Parry*, 1 T. R. 464, nor that the goods sold were the property of the plaintiff, *Blackburne v. Schoales*, 2 Campb. 341, and will not render the defendant liable if he would not be so upon the facts of the case: as to which, the wife must have an authority like any other agent. If she be not supplied with necessaries by her husband, there is an implied authority to contract for them; but if she be adequately supplied, an express authority must be shown. The principle has been clearly laid down in *Montague v. Benedict*. *Holroyd, J.*, says, "The husband is liable for necessaries provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife." And in *Etherington v. Parrott*, 1 Salk. 118, it was holden that the husband was not liable where his wife took up goods and pawned them.



BEST, C. J. I think there ought to be a new trial in this case. The learned Judge left the point correctly to the jury, but gave too much effect to the payment of money into court. Independently of this, the defendant, in point of law, was entitled to a verdict. A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he sees her wear it without disapprobation. In the present case the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the plaintiff. No article was delivered in his presence, nor was there distinct proof that any had been worn. If, therefore, money had not been paid into court, the defendant was clearly entitled to a verdict. What, then, is the effect of that payment? If the money had been paid in on the first items of the bill, an authority to contract at the date of these items would have been acknowledged — an authority which could not afterwards have been retracted but by express notice. But there is no evidence to show that the money was not paid in on the last items; and if so, there was no agency for the first. The payment into court, therefore, recognizes no agency beyond the amount of 10*l*. And if so, there is no pretence for supporting this verdict. It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The Court, however, cannot enter into these little delicacies, but must lay down a rule that shall protect the husband from the extravagance of his wife.

GASELEE, J. (a) It is difficult to lay down an abstract rule with respect to the liability of the husband; but on the subject of the payment of money into court I entertain no doubt. Payment into court generally in *assumpsit* admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due.

In *Cox v. Barry*, *Blackburn v. Schoales*, and *Bennett v. Francis*, the claim arose on a single transaction.

On these grounds it seems to me that too much weight was attached to the circumstance of the payment into court. The jury were probably embarrassed by it, and the verdict ought not to stand.

Rule absolute.

(a) *Park, J.*, was at the Old Bailey, and *Burrough, J.*, gave no opinion.

#### CROFTS v. STOCKLEY and Another. — p. 32.

If it appears on the whole, that the condition of a bail-bond is to appear in the Common Pleas, it may be described as such in the declaration, although the expression on the bond is, "to appear before our lord the King at Westminster," instead of, "before the justices of our lord the King."

DEBT on a bail-bond by the assignee of the sheriff. The declaration, after alleging that the plaintiff had sued out of the court of our lord the now King, before Sir *W. D. Best*, knight, and his companions, then his Majesty's justices of the Bench at Westminster, a certain writ by

which our said lord the King commanded the sheriff that he should take William Wright, if found in his bailiwick, and safely keep him, so that he might have his body before *the justices of* our said lord the King at Westminster on the morrow of All Souls then next, to answer, &c., and after averring the indorsement of the writ for bail, the caption of Wright, and the taking the bail-bond for his appearance, stated the condition of bond to be that Wright should appear, according to the exigency of the said writ, in the said court on the morrow of All Souls, to answer the plaintiff in a plea of trespass, and also to answer him according to the custom of his said Majesty's Court of Common Bench in a certain plea of debt.

At the trial, before *Park, J.*, Middlesex sittings after last Hilary term, the condition of the bond appeared to be for Wright to appear before our *said sovereign lord the King* at Westminster, on the morrow of All Souls, to answer the plaintiff in a plea of trespass, and also to answer him according to the custom of the King's Court of Common Pleas, in a certain plea of debt.

A verdict having been found for the plaintiff, notwithstanding it was objected that there was a material variance between the condition of the bond given in evidence and that set out in the declaration,

*Ludlow*, Serjt., obtained a rule nisi to enter a nonsuit on the ground of this variance. In *Renalds v. Smith*, 6 Taunt. 551, it was holden that a condition to appear before the King at Westminster was a condition to appear in the Court of King's Bench.

*Merewether*, Serjt., showed cause. Coupling the *ac etiam* clause with what precedes, it is sufficiently plain that the condition of the bond is to appear in the Court of Common Pleas, as alleged in the declaration.

*Ludlow*. If the pleader had set out the bond truly, the declaration would have been demurrable, and he ought not to escape the consequences of a demurrer by a palpable misstatement.

BEST, C. J. In *Renalds v. Smith*, *Gibbs, C. J.*, says, "Taking the whole record together, I cannot doubt that the bail-bond points out the Court of King's Bench." I cannot doubt here that, taking the whole of it together, the bail-bond points out the Court of Common Pleas, and that the statement in the declaration corresponds in substance with it. The rule must be

Discharged.

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### LEES v. WHITCOMB. (a) — p. 34.

A written agreement, "to remain with A. B. two years for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument by A. B. to teach.

**ASSUMPSIT.** The plaintiff declared, in the fourth count of his declaration, that in consideration the plaintiff, at the special instance and request of the defendant, would receive the defendant into his service, and cause her to be taught the trade and business of a dress-maker and milliner by the wife of the plaintiff, the defendant agreed, and undertook, and faithfully promised the plaintiff to continue with the wife of the plaintiff for two

(a) Communicated to the editor by a gentleman at the bar.

years, from the 5th of June, 1826, for the purpose of learning the business.

Averment of the defendant's reception and instruction by the plaintiff's wife, and of her staying in his service till April 14th, 1827. Breach, her refusal to remain in his service for the remainder of the period of two years.

In the fifth count the consideration was stated to be simply the receiving the defendant into his service, and the undertaking, to serve.

There were other counts; but these came nearest to the agreement between the parties, and were the only ones relied on. Plea, non assumpsit.

At the trial, before *Park, J.*, Middlesex sittings after Hilary term, the plaintiff, in support of his action, gave in evidence the following agreement, signed by the defendant:—

"I hereby agree to remain with Mrs. Lees, of 302 Regent Street, for two years from the date hereof, for the purpose of learning the business of a dress-maker. As witness my hand this 5th day of June, 1826.

"AMELIA WHITCOMB."

No premium was paid by the defendant, who, on the day mentioned in the agreement, entered the plaintiff's house, and left him in April following, by which time she had made such progress in learning the business that her services were becoming valuable to the plaintiff. It appeared that dress-making and millinery were two distinct businesses.

On the part of the defendant it was objected, that there was no mutuality in the above agreement, and that, therefore, it was not binding on the defendant; that the plaintiff not having bound himself to teach, although the defendant had agreed to remain and learn, there was an entire absence of consideration for the defendant's agreement; and that the agreement given in evidence did not correspond with that set out in the declaration. The plaintiff was thereupon nonsuited, with leave to move to set aside the nonsuit, and have a new trial.

*Taddy, Serjt.*, moved accordingly, and a rule nisi having been granted, *Wilde, Serjt.*, showed cause.

The fifth count is not supported by the evidence, because a contract to serve is very different from a contract to learn. And there is no consideration on the face of the agreement to support the fourth, as there ought to be under the statute of frauds. *Wain v. Walters*, 5 East, 10; *Saunders v. Wakefield*, 4 B. & A. 595; *Jenkins v. Reynolds*, 3 B. & B. 14. The plaintiff does not bind himself to teach, nor is the agreement even signed by him as a party to be charged.

The Court here called on

*Taddy.* The defendant could not engage to learn without an implied engagement on the part of the plaintiff to teach, so that the consideration sufficiently appears in the engagement to learn. [*Per Curiam.* The fourth count alleges the consideration to be to teach the business of a dress-maker and milliner; it was proved that the two businesses were distinct, and the writing put in evidence mentions only the business of a dress-maker.] But the word service as employed in the fifth count is usually and properly applied on the relation between master and apprentice, *Rex v. Lynn*, 6 B. & C. 97, and, therefore, includes the required consideration of the teaching, and gives sufficient mutuality to the contract. As to the omission of the plaintiff's signature, it is sufficient if a memorandum of a bargain be signed by one of the parties to the contract: *Egerton v. Matthews*, 6 East, 303.

**Brett, C. J.** I am of opinion that none of the counts are proved. The contract does not bear the meaning which is put upon it in the declaration. The businesses of milliner and dress-maker are very different, and that disposes of the fourth count. The fifth count alleges the consideration to be the plaintiff's receiving the defendant into his service, and the undertaking, an engagement to serve; but there is by the contract no obligation on the defendant to serve; her engagement is merely to remain for two years, and the plaintiff could not have compelled her to serve. It was probably the plaintiff's intention to prevent the defendant from leaving him and setting up for herself the moment she had learned his business, and there might have been a sufficient consideration for that if he had undertaken to teach; but there is nothing in the agreement to insure such instruction to the defendant.

**BURROUGH, J.** There is no consideration expressed in the agreement for the defendant's undertaking; and since the case of *Wain v. Warblers* that is indispensable.

**GASELEE, J.** The service in the fifth count is alleged generally, and not as a service for the purpose of learning. I feel some difficulty, but not sufficient to render it necessary for me to differ from the rest of the Court  
Rule discharged.



### HILLS v. STREET. — p. 37.

A tenant, distrained on for rent, requested the broker not to proceed to sale, and engaged, in consideration of forbearance, to pay the broker's charges. Time was given and the charges paid, but the tenant objected to the amount of them, and to the amount of rent demanded: Held, that this was not a voluntary payment, and that the charges, if irregular, might be recovered back in an action for money had and received.

**ASSUMPSIT** for money had and received by the defendant to the use of the plaintiff. At the trial, before *Gaselee, J.*, Middlesex sittings after Michaelmas term last, it appeared that the defendant, as broker for H. Elwes, had on the 28th of April, 1827, distrained on the plaintiff for 230*l.* 10*s.*, alleged to be due to Elwes for seven quarters' rent.

The defendant, upon written requests made by the plaintiff from time to time, and on condition of his paying the charges for distraining, forbore to remove or sell the goods distrained, the plaintiff engaging to pay the expense of keeping a man in possession. Accordingly the rent not having been satisfied, the plaintiff, upon the defendant's instances, paid him, on the 18th of May, 8*l.* 5*s.*, as broker's commission on a distress for 230*l.* 10*s.*, (at the rate of 5*l.* for the first hundred, and 2*l.* 10*s.* for every hundred over,) 4*l.* 4*s.* for the expenses of a man in possession—twenty-one days, and 1*l.* for drawing the form of the above-mentioned requests. On the 11th of June, he again paid the defendant for the expenses of the man in possession twenty-four days 4*l.* 4*s.*, and for drawing four more requests 1*l.*, making altogether 19*l.* 5*s.*, which the plaintiff now sought to recover, as having been illegally demanded and paid.

The man in possession having, on the 23d of June, quitted the house for the purpose of procuring a van to remove the goods distrained, the

plaintiff refused to let him in again. In consequence of this a second distress was made on the 16th of July, when the plaintiff replevied.

Early in the transaction the plaintiff had alleged that only six quarters' rent were due, but it did not distinctly appear at the trial whether before or at the time of the payments made to the defendant the plaintiff had expressed any intention to replevy. It appeared, however, that he had objected to the amount of the defendant's charge, when the defendant said, "The law allowed it, and he would have it."

For the defendant it was contended, that the charge for making the distress was reasonable and legal, and that whether the charge for keeping the man in possession were legal or not, yet that having been incurred at the express request of the plaintiff for his sole accommodation, and having been paid voluntarily with a full knowledge of all the facts, it could not now be recovered at the hands of the defendant. *Brisbane v. Dacres*, 5 Taunt. 143.

The learned Judge thought, that as the distress, in respect of which the charges were made, had never been brought to a conclusion, the goods not having been sold, but having actually been replevied under a subsequent distress, it was doubtful whether the charge for distraining could be sustained, (the stat. 57 G. 3, c. 93, s. 6, applying only to cases where the goods distrained are sold,) and whether the payment could be esteemed voluntary; which he told the jury it could not, if at the time it was made the plaintiff intended to replevy.

Whereupon a verdict was found for the plaintiff for 5*l.* 10*s.*, on the sum paid for making the distress, with leave for the defendant to move to set it aside and enter a nonsuit instead. Accordingly

*Wilde*, Serjt., in Hilary term last, obtained a rule nisi to that effect; against which

*Andrews*, Serjt., was to have shown cause; but the Court called on

*Wilde* to support his rule. The plaintiff's action is wrongly conceived. If he mean to dispute the validity of the distress, he cannot do it in an action of assumpsit; he ought to have tried that question in replevin: *Lindon v. Hooper*, Cowp. 414, *Knibbs v. Hall*, 1 Esp. N. P. C. 84. If his complaint is, that the defendant has demanded and received what he was not entitled to claim, the remedy is not by action for money had and received; *Fulham v. Down*, 6 Esp. 26. But the defendant's demand was legal and reasonable. The time and trouble of making an inventory of goods worth 300*l.* or 400*l.* is not overpaid at the rate the defendant charged; and it would be most injurious to tenants to compel the landlord to sell unrelentingly within the five days; yet this must be the consequence of refusing him the expenses of keeping a man in possession, or of disallowing the broker's charge, except in cases where there is an actual sale. At all events, the payments made by the plaintiff were voluntary, and with full knowledge of his situation; for though the defendant said that the law allowed the charge, it was at the express request of the plaintiff that it had been incurred, in order to obtain for himself the indulgence of further time for the discharge of the rent.

The circumstance of the goods not having been sold does not assist the plaintiff's claim, because the sale was prevented solely by his excluding the man in possession; and he ought not to escape the payment of the expenses by taking advantage of his own wrong.

BEST, C. J. Although, under the circumstances of this case, I would allow for the legal expenses of making the distress and inventory, yet this rule must be discharged; for that allowance could not be sufficient to turn the scale in the defendant's favor, the prothonotary stating to us, that on taxation of costs the broker's charge for distraining would not be permitted to exceed one guinea.

But I am clearly of opinion that this was not a voluntary payment. The broker is in possession of goods distrained for rent. The party distrained on is anxious that the goods should not be sold, and that time may be allowed him to pay the rent. The broker requires, as a condition of the indulgence, that he shall be furnished with a written request not to sell, and an undertaking to pay the expenses; this is given and enforced, but it is clear that it is given under an apprehension the sale would proceed unless the demand were complied with; and it is impossible to call a payment under such circumstances voluntary. If the payment were not voluntary, the plaintiff is entitled to recover back all that was paid improperly, which exceeds in amount the verdict he has obtained. *Lindon v. Hooper* only decides that an action for money had and received does not lie to recover back money paid for the release of cattle damage feasant, though the distress were wrongful; replevin or trespass being the proper form of action to try such a question. But the present question could not have been tried in replevin. There is no form of action but assumpsit for money had and received, in which a party can recover money paid, as this was, under duress.

GASELEE, J. The broker is the agent of the landlord, and must look to him for these expenses. But the broker, acting as a public officer, has no right to charge for giving time.

The rest of the Court concurred, and the rule was

Discharged

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GULLY and Others v. The Bishop of EXETER and DOWLING. —  
p. 42.

Where the plaintiff's title to an advowson was traced in *quare impedit* through a period of two centuries, and the defendant's claim arose on the alleged invalidity of a deed of 1672, the Court would not allow him to traverse all the allegations in the declaration, or to plead more pleas than were necessary to contest the deed of 1672.

IN this case, (see *ante*, page 68.) the plaintiff in *quare impedit* having been obliged to trace his title through a period of two centuries, and the defendant having in forty-three pleas traversed every allegation in the declaration, although the plaintiff's claim rested solely on the validity of a deed of 1672, which the defendant sought to invalidate by setting up a subsequent deed of 1692, the Court rescinded the rule to plead several matters, as having been made an improper use of.

*E. Lawes*, Serjt., thereupon obtained a new rule nisi, to plead the several matters following: —

1. That the deed of the 29th of April, 1672, was fraudulent and void as against subsequent purchasers.

2. *Non concessit* as to that deed.

3. Issue on descent from Lewis Stephens to J. Stevens.

4. *Non concessit* as to the deed of the 5th January, 1699.

5. *Non devisavit* as to the will of J. Stevens.

6. *Non concesserunt* as to the deed of the 20th December, 1719.

7. *Nul tiel record* of the fine of Hilary term, 6 G. 4.

8. That it was not levied to the uses stated.

9. *Nul tiel record* of the recovery of Easter term, 6 G. 1.

10. *Riens passa* as to the bargain, sale, and release of the 10th and 11th November, 1731.

11. *Non devisavit* as to the will of John Davie.

12. *Riens passa* as to the lease and release of the 23d and 24th April, 1777.

13. Issue on the descent from John Davie to Joseph Davie

14. *Non concessit* as to the grant of the next turn by Joseph Davie to William Slade Gully.

15. *Non devisavit* as to the devise thereof by William Slade Gully to the plaintiff.

16. The defendant's title ; against which

*Wilde*, Serjt., now showed cause, and objected, as before, that all the pleas except those which disputed the validity of the deed of 1672, and asserted the validity of the deed of 1692, were an abuse of the rule to plead several matters, being calculated only to put the parties to a great expense, and wholly immaterial to the merits of the cause, so that if the defendant succeeded on them he would gain nothing.

*E. Lawes*. Unless the defendant be permitted to traverse the allegations in the plaintiff's declaration, it is useless to require the plaintiff to make them. It has always been the practice of the Court to permit the defendant to take issue on every matter of fact advanced by the plaintiff, and to hold him, like the prosecutor in criminal proceedings, to the strict proof of his title. But without resorting to the discretion of the Court under the statute of Ann, a defendant may at common law, if he confines himself to one point in the plaintiff's case, employ several pleas to meet that point. In the plaintiff's case here are two points: 1. the allegation of his title ; 2. the disturbance by the defendants ; but the disturbance being admitted, the defendants may apply themselves exclusively to the title, and if that title consists of an allegation of many facts, may traverse them all. In *Roules v. Lusty*, 4 Bing. 428, which was a writ of entry for abatement of divers messuages and mills, a plea that R. S. devised them to T., who devised them to S., wife of R. D. C., who levied a fine to the tenant, was held not double ; and the Court said, " No matters, however multifarious, will operate to make a pleading double, provided that all taken together constitute but one connected proposition or entire point." " Duplicity is when two distinct matters, not being part of one entire defence, are attempted to be put in issue. But this can never apply to, nor does it preclude a party from introducing several matters into a plea, if they are constituent parts of the same defence ; for though it be true that issue must be taken on a single point, yet it is not necessary, nor ever can be, that such single point must consist only of one single fact." " In the case of *Robinson v. Rayley*, 1 Burr. 316, to an action of trespass defendant

had pleaded, amongst other things, a right of common. Plaintiff in his replication traversed, that the cattle were the defendant's own cattle, that they were levant and couchant, and that they were *commonable* cattle. To this there was a special demurrer, "that the replication is multifarious, and that several matters (specifying them) are put in issue, whereas only one single matter ought to be so." Lord *Mansfield* said, "As to the present case, it is true you must take issue upon a single point, but it is not necessary that this single point should consist only of a single fact. Here the point is the cattle being entitled to common: this is a single point of the defence. But in fact they must be both his own cattle and also levant and couchant, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite."

BEST, C. J. I am glad this question has been fully brought before the Court; for though merely a matter of practice, it is a point of great importance. On the decision of this question it depends, whether suits shall be carried on at great and unnecessary expense, or whether the real object of pleading shall be attained — that of reducing causes to a single point to be tried.

At common law a defendant was permitted to plead one plea only, and it was a principle that pleadings ought to be true. That can rarely be the case when many pleas are pleaded. But as it was sometimes found difficult to comprise the merits of a defence in a single plea, the statute of Ann permitted a party to plead as many as might be necessary to his defence, provided he obtained leave of the Court; thereby confining him to such as might be deemed, in the discretion of the Court, essential to the justice of his cause. We have enough of the merits of this cause before us to see what justice requires. The living in dispute was conveyed by a deed of 1672; the defendant claims under a deed of 1692, under such circumstances, that if the deed of 1672 is valid, the defendant can have no interest in the property. The justice of the case, therefore, requires that the defendant should plead nothing that does not tend to show the invalidity of the deed of 1672. He, however, insists on going into matters long subsequent even to the deed of 1692. But if his right accrues from that deed, what can he have to do with the subsequent matters?

It has been urged that it is in vain to require the plaintiff to make certain allegations, if the defendant may not deny them. But the object of pleading would be defeated, as it is already in some actions, if the defendant were to put the plaintiff upon tracing his whole title. The object of pleading is to narrow the matter in dispute to a single point; and a defendant ought not to be permitted to traverse a series of facts wholly immaterial to his own claim. Here he ought to break in on the plaintiff's title but once; that is, to dispute the validity of the deed of 1672: he may find it advisable to do that in more ways than one, and, therefore, he may add the plea of non concessit, but he shall only dispute the plaintiff's title in the point material to him. The practice in criminal proceedings, which has been alluded to, bears no analogy to the present question. The humanity of our law allows the prisoner to put the prosecutor upon proving his case in every particular; but in civil proceeding the interest of both parties requires that they should be put to as little expense as possible. Perhaps we may not be able to return to the ancient simplicity of pleading; but we must approach it as nearly



as we can, and remove, if it be possible, that reproach which has lately been so justly cast on the administration of justice. It is an important duty of the Court to exercise its discretion as to pleas, and to render justice as cheap and as expeditious as possible.

PARK, J., concurred.

BURROUGH, J. I am happy at this opportunity of giving a death-blow to a practice which has improperly prevailed for many years, and which I have long discountenanced.

If in this case the deed of 1672 be set aside, all the other issues fall to the ground. As to the practice of the Court, it cannot repeal the statute of Ann, and by that statute we are bound to exercise a discretion in the permission we grant to parties to plead several matters. It has been urged that all the issues proposed form but one point of the defence; if that were so, they might all be combined in a single plea. But they raise a great number of points wholly unconnected with the defendant's claim, and do not in any respect resemble those matters which are usually combined in a single plea, and make in effect but one allegation; as, for instance, that cattle are commonable, and levant and couchant.

GASELEE, J. The statute of Ann would never have been passed if such abuses had been anticipated as have taken place. The existing practice has given a defendant a most inconvenient advantage over a plaintiff. Before the passing of the statute of Ann, a party might have two or three substantial defences to an action, and yet could only bring forward one. The statute has enabled him, where he has more than one, to plead it, with the permission of the Court. Has he more than one in the present case? He may endeavor to perplex the plaintiff, but his only defence rests on the alleged invalidity of the deed of 1672. It has been urged, that he must refer to the other deeds to throw light on that; but he may do so in the way of evidence, and produce any documents which, in his opinion, tend to show that the deed of 1672 is fraudulent. What is now asked at our hands is, not to allow an additional ground of defence, but to throw difficulties in the way of the plaintiff. It is the more necessary, too, for us to be cautious, because, if the plaintiff be tripped up, it is a matter of doubt whether the defendant might not be entitled to a writ to the bishop upon a mere fabricated title; but on that I give no opinion.

It has been argued, that as the plaintiff brings the defendant into Court, the plaintiff ought to stand the shock of all attacks on his title; but the defendant here has never been in possession, and it is he in fact who brings the plaintiff into Court, by entering a caveat with the bishop. The allegation that the several facts which it is proposed to dispute constitute but one point, is far from being correct; and the case of *Rowles v. Lusty* has no application to the present, because the several conveyances mentioned in the plea in that case formed but one assurance.

The true principle of pleading several matters is, that if the justice of the case requires that a party should allege several defences, the Court will not prevent it; but they will not allow a party to plead, merely for the purpose of throwing difficulties in the way of his opponent. In the present case there is nothing essential to the defendant's case, but to contest the validity of the deed of 1672. The defendant, therefore, shall be put to elect which link of the plaintiff's title he will contest; and if

he contests the deed of 1672, he may plead non concessit, and that the deed was fraudulent.

Rule discharged as to the other matters.

CHOLMELEY v. PAXTON and Others. — p. 48.

1. Where money, which under a power in a will was directed to be raised by the sale of an estate, and to be invested by trustees with the consent by deed of the party interested, was invested partly in 1783, without any such consent by deed, and partly in 1806, by the person interested himself, the trustee having become non compos, and an act of parliament, reciting these investments, appointed a new trustee: Held, that neither the act nor the lapse of time cured the defective execution of the power, as against a writ of formedon.
2. The issue was, whether the money had been invested with the consent of the cestui que trust, according to the directions of this will: Held, that it was correct to direct the jury to consider, whether it had been invested with the consent of the cestui que trust manifested by deed.

**FORMEDON.** The demandant claimed under the will of Sir Henry Englefield, who devised the property in question to the use of trustees in trust for his son, Henry Charles, for life, without impeachment of waste; remainder to the first and other sons of Henry Charles in tail male; remainder to his son Francis Michael for life without impeachment, &c., with like remainder to his sons in tail male; remainder to devisor's daughter, Theresa Ann, for life, without impeachment of waste; remainder to her first and other sons in tail male.

The devisor's son, Henry Charles, took possession of the property, and died without issue, as did Francis Michael; and the devisor's daughter married Francis Cholmeley the father, by whom she had issue the present demandant, who, upon her death, commenced the present suit.

The defendants, after taking issue on most of the allegations of fact in the declaration, pleaded eighthly and ninthly,

That the devisor by his will declared his further will to be, that notwithstanding any of the uses or estates before created, the trustees might, from time to time, during the lives of Henry Charles, Francis Michael, and Theresa Ann, or any of them, at the request and by the direction and appointment of the person who, for the time being, should be entitled to the rents and profits of the property in question, signified by deed under his or her hand and seal, attested by two or more witnesses, sell or exchange the property for such prices as to the trustees should seem reasonable; and in case of sale, should invest the money in the purchase of other lands under the same trusts, and till such purchase, in real or government securities, with such consent as aforesaid, testified as aforesaid, the interest to be applied to the same trusts as the rents of the lands.

They then averred the death of the devisor in 1780, and that in 1783, the trustees, (Lord Cadogan and Sir Charles Bucke,) by indenture of bargain and sale, sold the property in question (being a portion of that devised,) for 13,400*l.* to William Byam Martin, under whom the defendants claimed; and that Henry Charles Englefield, (then Sir Henry Charles,) by the same indenture, sold the standing timber to him for 2448*l.* (a)

(a) See 3 Bingh. 207

It was then averred, that as well the said sum of 13,400*l.*, as the sum of 2448*l.*, were, with the consent of the said Sir Henry Charles Englefield, placed at interest on government securities in the name of Lord Cadogan, (who had survived Sir C. Bucke,) according to the directions of the said will, for the purposes and on the trusts therein mentioned.

This allegation the demandant traversed, and issue was joined on the point.

At the trial, before *Littledale*, J., last Berkshire Summer assizes, the defendants, in support of their ninth plea, proved, that in 1783 Lord Cadogan had invested the 13,400*l.* in real and government securities; and that in the year 1806 Mr. Nowell, the solicitor of Sir Henry Charles Englefield, having, in the course of conversation with the latter, discovered that Sir Henry had received the 2448*l.* for the timber left standing, told him, that as the timber was not cut down he had no right to receive the money, but the same ought to have been paid to Lord Cadogan, and held by him on the same trusts as the 13,400*l.* were held. Sir Henry then said he would rectify the error, and on the 29th July, 1806, he transferred to the account of Lord Cadogan 3681*l.* 14*s.* 3 per cent. consolidated bank annuities, (being the amount of stock, which said 2448*l.* would have purchased at the time the same was paid to Sir H. C. Englefield,) and the draft of a deed of declaration of trust thereof was prepared by Mr. Nowell, and left for the approbation of Mr. White, of Lincoln's Inn, the solicitor to Lord Cadogan.

Before this draft was engrossed Lord Cadogan died, and consequently no declaration of trust was ever executed, nor was the stock accepted by him; but the whole of the money was applied under the trusts of the testator's will.

On the 13th July, 1819, by an act of parliament, intituled "An act for appointing new trustees for carrying into execution the trusts and powers contained in the will of the late Sir Henry Englefield, Baronet," and to which the demandant was a consenting party,

Reciting (inter alia) the loan of 12,500*l.* to Lord Middleton, Marquise Constable, and Robert Dynely, upon mortgage of estates in Yorkshire, and that the residue of trust-money arising from sales under the will of Sir H. C. Englefield, consisted of 4282*l.* 14*s.* 9*d.* 3 per cent. consolidated bank annuities, then standing in the name of Lord Cadogan in the bank books, (this sum was made up of the 3681*l.* 4*s.*, transferred as before mentioned by Sir H. C. Englefield, and 601*l.* invested by the trustees;)

Also the death of Charles Lord Cadogan in 1807, having by his will appointed Lord Orford, Hans Sloane, and Joseph White, executors;

Also a commission of lunacy, dated 30th October, 1808, against Charles Henry Earl of Cadogan, the son, and that Lord Orford and Hans Sloane were appointed committees of his person and estates;

Also that Francis Cholmeley, the son, (the demandant,) had attained the age of twenty-one years, and under the will of Sir H. Englefield was the first tenant in tail of the manors, &c., thereby devised;

Also that Sir H. C. Englefield and Francis Cholmeley were desirous that the estates, trusts, and powers given by the testator's will, which became vested in said Charles Henry Earl of Cadogan, on the decease of said Charles Lord Cadogan, should be vested in new trustees, —

It was enacted, that all and singular the manors, &c., (except such of them as had been sold,) should be vested in Wm. Cruise and Edward Jerningham, Esqrs., their heirs and assigns; and that the said Lord Orford and Hans Sloane should immediately assign to Cruise and Jerningham the said sum of 12,500*l.* secured upon mortgage, and all the messuage, &c., comprised therein, and also transfer to Cruise and Jerningham the said sum of 4282*l.* 14*s.* 9*d.* 3 per cent. consolidated annuities, to the uses, and upon the trusts, &c., subsisting under the testator's will, &c.

The learned Judge directed the jury that the tenants had not established their allegation that the money was invested according to the directions in the will, inasmuch as the will required that the money should not only be laid out with the consent of the tenant for life, but that such consent should be given by a deed attested by two witnesses, whereas no such attested consent had been proved as to the investment of the 13,400*l.*; and the 2448*l.*, as not having been obtained by a sale pursuant to the directions of the will, could not be said to have been invested under the will.

The jury found all the issues for the demandant, and particularly that the 2448*l.* had not been invested under the directions of the will.

*Peake*, Serjt., in Michaelmas term, moved to set aside this verdict, and have a new trial, on the ground that the evidence established the allegation in the ninth plea, and that the jury had been misdirected.

*Cross*, and *Russell*, Serjts., who showed cause, contended that the evidence failed to establish any consent by deed attested; that in the absence of such consent the 13,400*l.* and the 2448*l.* had not been invested pursuant to the directions of the will; that the issue, therefore, directly raised the question as to that consent; and that consequently the direction given to the jury was right. The act of parliament did not alter the case, for it merely recited that the sales had been made, and the money invested, without sanctioning the investment, or showing that it had been made pursuant to the directions of the will. They relied on the decision in the same case, ante, 3 Bingham, 207.

*Bosanquet*, *Peake*, and *Ludlow*, Serjts., in support of the rule. The issue was not whether the investment had been authorised by a consent under a deed attested, but whether in effect it was made pursuant to the directions of the will. And the evidence was sufficient to show that it was so made. The main object of the will was that the money should not be invested without the consent of the party interested in it. The mode in which that consent should be given was immaterial. That the consent of Sir H. C. Englefield had actually been given could not be doubted; the fact of his having so long received, without objection, the interest of the money invested, and having himself invested another portion of it in the same fund, was conclusive; and after such a length of time it might be presumed that his consent had been given with due formality. But, at all events, the act of parliament cured every defect of form, by ordering a transfer of the whole property to new trustees, after a recital of all the previous steps that had been taken. If any of those steps had been deemed incorrect, either the transfer would have been refused, or the defects in the proceeding would have been specifically noticed and remedied.

*Best*, C. J. The issue was properly left to the jury, and properly found by them. It is impossible to say that these moneys were laid out according to the directions of the testator's will. Without discussing the question whether or not a deed attested was essential to the consent of

Sir H. C. Englefield, it is sufficient to observe that one of the sums was not so much as invested by Lord Cadogan. In general, *qui facit per alium, facit per se*; but that maxim cannot be applied in the present case, for the legislature appointed new trustees, because the second Lord Cadogan was *non compos mentis*; and it is impossible to say that, if he had been in his senses, he might not, if applied to to make the investment which was made by Sir H. C. Englefield, have refused to have done so, or to have attempted to patch up a transaction invalid from the beginning.

The rest of the Court concurring, the rule was

Discharged.

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HOLL and Another v. CAROLINE MARY HADLEY. — p. 54.

**Variance.** Evidence that according to the custom of the trade the plaintiffs delivered coals to N. H. daily, and that at the end of every month he gave a bill, payable in two months:

**Held,** not sufficient to charge defendant upon a guaranty for the payment of coals to be delivered to N. H. at a credit of two months from the delivery.

THE plaintiffs declared that by a certain memorandum of agreement made between the plaintiffs and one Nathaniel Hadley the younger, and the defendant, — after reciting that the plaintiffs had for some time past supplied Nathaniel Hadley the younger with coals, on a credit of two months from the delivery, and having been requested to furnish coals to an increased amount, had declined to do so without having some security for the payment thereof, and that accordingly Nathaniel Hadley the younger had requested the defendant to become such security, which she had consented to do, — the defendant did thereby agree to and with the plaintiffs, that she would pay and discharge all such sums of money as might thereafter become due to them for coals sold by them to Nathaniel Hadley the younger, to any amount not exceeding 300*l.*, in case Nathaniel Hadley the younger should not pay the same within one month after the expiration of the aforesaid credit of two months; and the plaintiffs thereby agreed to give the defendant a further period of three months for making good any claim, which they might have to make under the said guaranty, and which should be in equal proportions with Nathaniel Hadley and Charles Simpkin, who were also guaranties for Nathaniel Hadley the younger.

The plaintiffs, after an allegation of mutual promises to fulfil the agreement, averred a delivery of coals to Nathaniel Hadley the younger to a large amount upon the aforesaid credit of two months.

Breach, that although as well the said credit, and the time for payment of the price of the said coals by Nathaniel Hadley the younger to the plaintiffs, as also one month after the expiration of the said credit, had elapsed, heretofore, to wit, on, &c., at, &c., yet N. Hadley the younger did not, although he was afterwards, to wit, on, &c., at, &c., requested by the plaintiffs so to do, pay to the plaintiffs, or either of them, the said sum of money so due and payable to the plaintiffs as aforesaid, or any part thereof, but wholly neglected and refused so to do, of all which premises the defendant afterwards, to wit, on, &c., at, &c., had notice; and although the said further period of three months from the expiration

of the said credit of two months, and the said further time of one month, for the defendant's making good the claim which the plaintiffs had under the said guaranty, had long since elapsed, and although the equal proportion of the said claim of the plaintiffs to be borne and discharged by the defendant in pursuance of the said agreement amounted to a large sum of money, to wit, the sum of 300*l.*, and the defendant afterwards, to wit, on, &c., at, &c., had notice of the premises, and was then and there requested by the plaintiffs to pay them the said sum of 300*l.*, yet the defendant, not regarding her said agreement and her said promise and undertaking, had not yet paid.

On the trial of the cause, before *Best*, C. J., at the sittings in London in Easter term last, the plaintiffs proved the agreement set forth in their declaration, namely, a guaranty for coals to be supplied to the defendant's brother on a credit of two months from the delivery. The plaintiffs' witness, who was called to prove the delivery of the goods, stated, that they were delivered according to the custom of the trade, which was, that coals were supplied to the dealer daily during the course of a month, and that on the last day of the month the dealer gave a bill at two months for the amount of the coals supplied in the course of that month, so that he had a credit of three months from the delivery of such of the coals as were supplied on the first day of the month, and more than two months' credit for every parcel of coals supplied, except such as might be delivered on the last day of the month.

On the part of the defendant it was contended, that this was a dealing at variance with the express language of the guaranty, which was for a credit of two months from the delivery. On the part of the plaintiffs it was urged, that the delivery being according to the custom of the coal trade, which must have been in the contemplation of the parties at the time the guaranty was executed, the whole supply of coals for each month must be considered as delivered on the last day of the month, which was a delivery within the terms of the guaranty. The plaintiffs, however, were nonsuited.

*Wilde*, Serjt., having obtained a rule nisi to set aside the nonsuit, on the grounds urged on the part of the plaintiffs at the trial,

*Bosanquet*, Serjt., who showed cause, urged that the variance was material; for a large quantity of coals might be delivered on the first day of a month; the dealer might be solvent at the end of two months from that day, and insolvent before the expiration of three; so that by extending the credit in this way to three, the defendant's responsibility would be enlarged greatly beyond what she had stipulated for; and her agreement contained no mention of the custom of the trade.

*Wilde*. It appears from the recital of the agreement to have been the intention of the parties that the supply of coals should be continued on the same footing as before; and the evidence shows that it was the course of dealing between the parties not to reckon the days of the current month, but to consider the coals as delivered all on the last day of the month. There is, perhaps, a latent ambiguity in the agreement, but the evidence has cleared it up.

*Cur. adv. vult.*

*BEST*, C. J., now said, With every anxiety to get rid of the nonsuit in this case, we are of opinion it cannot be set aside.

Rule discharged.

COATES and Another, Assignees of PLASKETT, a Bankrupt, v. BAINBRIDGE and Others. — p. 53.

Defendants' agents abroad, by order of defendants, received money on defendants' account, and stated the fact in a letter to defendants. Defendants replied, acknowledging the receipt of the agents' letter, and giving them directions as to the disposition of the money :

Held, that the agents' letter was, coupled with the defendants', admissible in evidence to charge the defendants with the receipt of the money.

ACTION for money had and received by the defendants to the use of plaintiffs as assignees of Plaskett.

At the trial, before *Best*, C. J., London sittings after Hilary term, a verdict was taken for the plaintiffs for 956*l.* 5*s.*, subject to the opinion of the Court upon a special case, with liberty to turn it into a special verdict. Of this case it is only necessary for the purpose of the present decision to state the following facts, the Court having ordered sundry contested points, on which they delivered no opinion, to be re-argued upon a special verdict.

Thomas and Flaherty, merchants at the Cape of Good Hope, to whom Plaskett had been in the habit of consigning goods to be sold on his account, owed 1100*l.* to Plaskett before his bankruptcy, which took place on the 2d of November, 1820.

In September, 1820, Plaskett was much pressed for payment by one Stevens, to whom he owed 1000*l.* Plaskett, therefore, gave him four bills of exchange for 250*l.* each, drawn on Thomas and Flaherty, at six, nine, twelve, and fifteen months, together with a letter of advice to them.

After the act of bankruptcy, these bills were returned by Stevens to Plaskett, and cancelled, because by some mistake they did not correspond with the letters of advice, and Plaskett drew in lieu thereof four other bills on Thomas and Flaherty, at six, nine, twelve, and fifteen months, bearing date the 30th of October, but not in fact drawn till after the 2d of November.

Stevens indorsed these bills to the defendants as a collateral security for a debt due to them from Stevens.

In February, 1821, defendants, at the request of Stevens, sent these bills with the letter of advice, and a letter of recommendation which they had procured, to Marsh and Cadogan at the Cape, with authority to present them to Thomas and Flaherty there. Marsh and Cadogan answered as follows : —

“Gentlemen, — The arrival of the *Antelope* on the 11th ult. put us in possession of your favor of the 17th February last, enclosing the four bills drawn by Mr. John Plaskett on Messrs. Thomas and Flaherty, each for 250*l.*, at six, nine, and twelve months' sight.

“For these bills we have this day settled on the condition of interest deducted 43*l.* 15*s.*, and of your guarantying them against future liability on their payment.

“The sum thus paid to us this day, is six dollars 11,475, being 956*l.* 5*s.*, at 140 exchange. For the conversion of this currency, (less our commission,) we must wait necessarily until the first government drawing.

“Hoping that this settlement may favor us with your approbation, we subscribe ourselves very truly,

“Cape of Good Hope,

MARSH and CADOGAN.”

“2d August, 1821

essrs. Bainbridge and Brown, London.’

Immediately on the receipt of the above letter, the defendants informed Stevens that the bills had been paid to Marsh and Cadogan. The defendants afterwards sent the following reply to Marsh and Cadogan:—

“Gentlemen,— We have to acknowledge the receipt of your favor of the 2d August, advising your being in possession of ours of the 11th February, covering 1000*l.* in four bills on Messrs. Thomas and Flaherty, who had at once complied with the drawer’s wishes, and you have settled with them on the conditions of discount deducted 43*l.* 15*s.*, and of our guarantying them against future liability of payment. This we do with pleasure, because we are assured the circumstances under which these bills were drawn were fully explained to Mr. Plaskett’s assignees, who are satisfied therewith, and his accounts passed accordingly; we, therefore, engage to hold you harmless for the stipulation you have entered into on our behalf. We observe you have placed to our credit 11,475 rix dollars, being 956*l.* 5*s.*, the amount received at 140 exchange, and we note for the conversion of this fund into bills (less your commission) you must wait the drawing of government. We shall of course be glad to receive the amount as soon as you can procure the bills, and we beg to offer our thanks for your attention to this matter.

“London, Nov. 21, 1821.

BAINBRIDGE and BROWN.”

“Messrs. Marsh and Cadogan.”

And defendants again wrote to Marsh and Cadogan to the following effect:—

“Gentlemen,— We beg to hand you a triplicate of our last respects of the 21st November, and feel some surprise that you have never since taken the least notice of your engagement to remit us the 11,475 rix dollars received for our account from Messrs. Thomas and Flaherty, which, agreeable to your letter of 2d August, you stated you should do as soon as the government drew. Now, as we know they have since drawn, we can only presume in the hurry of other engagements ours has escaped. Our friend, William Effingham Lawrence, Esq., having occasion to visit the Cape, we request, in the event of your not having remitted us the amount, that you will be pleased to pay over to him the 11,475 rix dollars, (less your commission.)

“London, April 24, 1822.

BAINBRIDGE and BROWN.”

“Messrs. Marsh and Cadogan.”

The defendants never received the money from Marsh and Cadogan, they having failed shortly after the date of their letter of August 2d.

One question was, Whether the foregoing letters of Marsh and Cadogan were properly received in evidence to charge the defendants with the receipt of the money.

*Wilde*, Serjt., for the plaintiff. The letters of Marsh and Cadogan, taken by themselves, could not perhaps be admissible in evidence against the defendants, the present rule being that though whatever an agent says or writes in the making of a contract is evidence against his principal, the testimony of the agent himself is necessary to prove whatever passes on the subject of the contract on other occasions. But the letters as adopted and acted on by the defendants, and coupled with the defendants’ letters, are clearly admissible; they are essential to the explanation of the defendants’ letters, and with that explanation the defendants’ letters contain a clear admission that the money in question had been received by these agents on their behalf.



*Taddy*, Serjt., for the defendants. The defendants' letters rest altogether upon the representations contained in the letters from Marsh and Cadogan; but such representations are inadmissible. *Kahl v. Janson*, 4 Taunt. 565, and *Langhorn v. Alnutt*, 4 Taunt. 511, expressly decide that the letters of an agent abroad to his principal, containing a narrative of a transaction in which he had been employed, are not admissible in evidence against the principal, as the representation of the agent; and the principle laid down by the Master of the Rolls in *Fairlie v. Hastings*, 10 Ves. 128, was distinctly recognised.

[*Gaselee*, J. There is here a declaration by the defendants that the money is in the hands of Marsh and Cadogan as their agents, and it is nowhere contradicted.]

That declaration of the defendants is only made on the credit of Marsh and Cadogan's letters, which do not become evidence because the defendants have given credit to them, otherwise a ready means would be found for admitting most representations from agents, inasmuch as they generally obtain credit at the hands of their principals.

*Cur. adv. vult.*

BEST, C. J., this day, after requiring that the principal question in the cause should be put into a special verdict, and argued again, said on the subject of the evidence. The letters written by the agents, would not have been admissible unless they had been written by the agents while acting within the scope of their authority, upon a matter intrusted to them by their principals. The letters of these agents were written under these circumstances; the principals have adopted what was done by their agents, and having upon the faith of their assertion taken credit for the sum named in those letters, the letters were properly received in evidence.

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#### PARKER v. CROLE.—p. 63.

Bankruptcy and certificate are no bar to an action in tort against a broker for selling out a plaintiff's stock contrary to orders.

THE first count of the declaration stated, that before and at the time of the grievances complained of, the plaintiff was possessed of, and lawfully entitled to, a certain interest or share, to wit, 2,800*l.* share or interest in the joint stock or fund, commonly called the 3 per cent. reduced annuities, transferable at the Bank of England, the same 2,800*l.* share or interest then standing in the name of the plaintiff, in the books of the Governor and Company of the Bank of England and being of great value, to wit, of the value of 2,000*l.* of lawful money, to wit, at, &c.; and that, before and at the time of the committing of the grievances by the defendant and one John Tenbrock, thereafter mentioned, the defendant and the said John Tenbrock (since deceased) carried on the trade or business of stock brokers, in copartnership together, to wit, at, &c.; and the plaintiff, before the time of the grievances, to wit, on, &c., at, &c., retained and employed the defendant and the said John Tenbrock, deceased, in his lifetime, as such partners and brokers as aforesaid, for certain reasonable reward to the defendant and the said John Tenbrock, in that behalf, and then and there made and delivered to the defendant and the said John Tenbrock, as such partners and brokers aforesaid, a certain letter or power of attorney, whereby she, the said plaintiff, made and constituted them, the defendant and the said John Tenbrock, or either of them, her true and lawful attorneys or attorney, for her and in her name, from time to time to receive all such dividend or dividends as should from time to time

accrue or become due to the plaintiff, upon or in respect of her said share of and in the said fund or stock; and for her and in her name, and as her act and deed, to make sale of the said share of and in the said fund or stock, or any part thereof; and thereupon it then and there became, and was the duty of the defendant and the said John Tenbrock, deceased, as such brokers and partners as aforesaid, in all things to obey, abide by, and fulfil the orders and directions of her the plaintiff, in and about using the said letter of attorney, and in and about the management and selling of the said share of her the plaintiff, of and in the said stock or fund, under or by virtue of the same letter or power of attorney:

And the plaintiff said, that at the time of delivering the said letter or power of attorney to the defendant and the said John Tenbrock as aforesaid, to wit, on, &c., at, &c., she, the plaintiff, did direct and order them, the defendant and the said John Tenbrock as such brokers of her the plaintiff, not to sell, dispose of, or transfer the said share or interest of her the plaintiff, in the stock aforesaid, or any part thereof, without receiving permission and direction of and from her the plaintiff, for that purpose; and the defendant and the said John Tenbrock then and there received the same letter and power of attorney of and from the plaintiff, under and subject to that proviso, and upon such condition; yet the defendant and the said John Tenbrock, well knowing the premises, but not regarding their duty as such brokers as aforesaid, nor the orders and directions so given to them by the plaintiff, but contriving, &c., to deceive and defraud the plaintiff in this behalf, afterwards, to wit, on, &c., at, &c., wrongfully and injuriously, and without any permission, direction, or instruction whatever from her the plaintiff for that purpose, and against the knowledge and consent of her the plaintiff, sold and disposed of the said share or interest of the plaintiff in the stock aforesaid, and converted and disposed of the proceeds thereof to their own use, to wit, at, &c.; and the defendant and the said John Tenbrock, then and there, and for a long space of time, to wit, for the space of four years then next following, craftily and fraudulently pretended to the plaintiff, to wit, at, &c., that her said share or interest of and in the stock aforesaid, during the time aforesaid, remained unsold, and standing in her the plaintiff's name, in the books of the Governor and Company of the Bank of England; and during all the time aforesaid, there craftily, falsely, and fraudulently concealed from the plaintiff, that they had so sold and disposed of the said share or interest; whereby the plaintiff, during all the time aforesaid, and until the death of the said John Tenbrock and until the estate of the said John Tenbrock became and was wholly insolvent, was prevented and hindered from commencing any action or suit against the defendant and the said John Tenbrock, or either of them; and the plaintiff hath thereby lost and been deprived of all availing remedy against the estate of the said John Tenbrock, to wit, at, &c.

The second count varied from the preceding only in stating that the defendant and Tenbrock wrongfully and injuriously, and without the consent or direction of the plaintiff, and against her will, sold and disposed of the said last-mentioned share or interest in the said public fund or stock, and fraudulently and deceitfully took, had, and disposed of the money arising from such sale to their own use; and the plaintiff, by reason of the several premises in that count mentioned, had wholly lost and been deprived of her said share or interest of and in the said public fund or stock in that count mentioned; and in addition thereto, by means of the premises, and of the said John Tenbrock having since died insolvent, she the plaintiff had been and was prejudiced and hindered, in and about recovering lawful compensation in respect thereof, and had been and was otherwise greatly injured and damnified, to wit, at, &c.

Neither Mr. Sutherland, nor Mr. Wylie, nor Messrs. Sureau and Co. did or would procure any return cargo for the ship Lord Cawdor, at Port-au-Prince, pursuant to the terms of the charter-party.

Wherefore, in the month of July, 1819, Captain Brooks loaded the ship, Lord Cawdor, with goods at Port-au-Prince, on freight for London, where she arrived with and discharged the last-mentioned goods on the 17th October following, and the defendants received for the freight of those goods the sum of 779*l.* 0*s.* 9*d.*, but from that sum the defendants were entitled to deduct for lighterage and commission, leaving a net balance of 671*l.* 11*s.* 3*d.*

The freight of the ship Lord Cawdor, according to the terms of the charter-party, from the 17th June, 1818, to the 17th October, 1819, amounted to . . . . . £2666 17*s.* 4*d.*

10 per cent. primage . . . . . 266 13*s.* 8*d.*

Total . . . . . £2933 11*s.* 0*d.*

The freight up to the time of the attachment, with primage and gratuity, amounted to 204*l.* 2*s.* 10*d.*

By the charter-party which accompanied the case, O'Brien hired the ship for six months, or such longer period as he might think proper to employ her for the voyage. The master was to take on board all such goods and merchandises as should be tendered to him by the freighter; to sail from London for such ports as freighter should order; and on arrival, give notice to freighter's agents, and deliver cargo from alongside according to bills of lading: then, to receive on board such goods as freighter's agents or assigns should tender, and sail to a port in the Channel for orders, and thence to London or a port on the Continent. He was not to take on board any goods other than from the freighter. The freighter covenanted to put goods on board, to dispatch the ship from London to the West Indies, to unship the cargo there, and procure another for Europe; to dispatch the ship home to Europe; to unload her on her arrival, and to pay freight 1*l.* 1*s.* per ton per month, to commence from June 17, 1818, and continue till final discharge. The owner was to be paid two months' pay on the ship's clearing at the Custom-house, by bill at two months, and after six months, a further payment of two months by a similar bill, and the remainder, on the discharge of the ship, in cash. The parties bound themselves for the performance of these covenants in the penal sum of 1000*l.*

By the proceedings in the court at Port-au-Prince, which also accompanied the case, it appeared that on the petition of Brooks, judgment was given against O'Brien by default, as absent, for 10,545 dollars for freight of the brig Lord Cawdor: that upon this judgment the cargo was attached as O'Brien's in the hands of Sureau and Co. That Sureau and Co. then alleged they had no property of O'Brien's, the whole cargo having been previously assigned by him to Campbell and Bowden, for a debt due from him to them, and that Sureau & Co. were agents for Campbell and Bowden. That Wylie and Sureau as agents for O'Brien, Campbell and Bowden, appealed against the judgment, which was then confirmed upon full investigation into the merits of the case on both sides.

The question for the opinion of this Court was

Whether the plaintiffs were entitled to recover back all or any of the money so received by the defendants: if the Court should be of opinion that they were so entitled, the verdict was to stand for such sum as the Court should direct; but if the Court should be of opinion that the plaintiffs were not entitled to recover any thing, a nonsuit was to be entered, subject, in either case, to the liberty reserved as to a special verdict.

*Taddy*, Serjt. The plaintiffs are entitled to recover in respect of the goods which were attached by the defendants at Port-au-Prince without sufficient authority: they are also entitled to recover in respect of the freight which the ship earned on her homeward voyage.

The goods belonged to the bankrupt when they arrived at Port-au-Prince, and the defendants had no right to cause them to be attached for the penalty in the charter-party. The charter-party was made in England, between English subjects, and the voyage was to have been completed at London; the law of England therefore alone applied to the contract, and the Court at Port-au-Prince had no jurisdiction.

But at all events the plaintiffs were entitled to the freight earned on the homeward voyage. The homeward cargo was put on board to be conveyed on the bankrupt's responsibility; it could not have been loaded without his implied consent, since the ship was his for the time being; he alone could have demanded the freight of the goods at the hands of the consignees, and he was liable to the defendants under the charter-party for the hire of the ship. It would be too much to give the defendants the hire and the freight also.

*Wilde*, Serjt., contra. The action does not lie. At the time the goods were attached under process of the foreign court, they had ceased to be the property of the bankrupt, who had assigned them to Campbell and Bowden in payment for advances made by them. It is immaterial, therefore, to the decision of this case, whether the foreign court had jurisdiction or not. With respect to the homeward freight, there having been a distinct repudiation of the engagement to reload under the charter-party, by the bankrupt's agents Sutherland and Sureau and Co., it is clear that the cargo was procured by the Captain on account of defendants, the owners. The Court here called on

*Taddy* to argue on the effect of the assignment by the bankrupt, previously to the adjudication in the foreign court. He then urged that it was made merely by way of security, and not to divest the bankrupt of his interest in the goods. The defendants, at all events, were estopped to deny that the goods or the money arising from the sale of them did not belong to the bankrupt, for they had recovered the money from Sureau and Co. at Port-au-Prince, as money of the bankrupt's, and under the charter-party between them and the bankrupt. Then as to the homeward freight, inasmuch as a contract by deed could only be discharged by deed, there never had been any repudiation of the charter-party by the bankrupt's agents, but simply an omission to find a homeward cargo, for which omission the defendants might have recovered damages in an action of covenant, but which did not entitle them to procure freight on their own account.

BEST, C. J. The first question is, Whether the plaintiffs can recover the proceeds of the goods attached at Port-au-Prince. I am clearly of opinion that they cannot, because the bankrupt (and the plaintiffs stand in his place) assigned those goods before his bankruptcy to Campbell and Bowden, in respect of advances made and to be made by them. The goods, therefore, belonged to Campbell and Bowden, and the bankrupt could neither have sued for that property nor for its value without impeaching the validity of his own assignment. The validity of the judicial proceedings therefore at Port-au-Prince have no bearing on the question, and it is unnecessary for us to discuss any point in the law of nations.

With respect to the claim for the homeward freight, although it is true, generally speaking, that an engagement by deed can only be remitted by deed, it is impossible after what has taken place, to hold that the plaintiffs have any claim in respect of that freight. It was not brought home for the

bankrupt, nor was the ship loaded until his agents had rejected all interest in the freight. Under such circumstances what was the captain to do? was he to go home in ballast, or to procure a cargo for the benefit of his owners? This precludes the bankrupt and his assignees from any claim under the charter-party, if it does not get rid of it. Supposing they were to sue on the charter-party, the answer would be, "The ship was ready for you, but you had no goods to send on board." We think, therefore, that there is no foundation for either of the claims, and that our judgment must be for the defendants.

BURROUGH, J., expressed a similar opinion, and

GASELEE, J., who was at chambers, had desired that his concurrence might be signified.

Judgment of nonsuit.

CARTER and Others v. SANDERSON. — p. 79.

1. In a company constituted by letters patent, with power to make reasonable by-laws, a by-law for the steward to provide a dinner for certain members of the company on Lord Mayor's day, with an allowance for doing so, or to pay a fine of 20*l.*, or excuse himself by swearing he is not worth 300*l.*, is a bad by-law. At all events,
2. The allowance is a condition precedent, and ought to be averred.

DEBT by the master and wardens of the Coopers' Company, on a by-law of the company, against their steward, to recover a penalty incurred under the by-law, for not giving a dinner to the company on Lord Mayor's day. The declaration set forth certain letters patent of the 16 H. 7, constituting the company a guild or fraternity, and conferring on them various privileges, and, among others, that the masters, wardens, or keepers, and commonalty for the time being, might lawfully and with impunity make lawful and honest meetings, and make reasonable laws, statutes, and ordinances for the wholesome rule and government of the said mystery according to the exigency of necessity, as often as and when need should be, so as such laws, statutes, and ordinances should not any ways be against the laws and customs of his said kingdom of England, or of his said city; likewise certain letters patent of the 13 Car. 2, confirming the grant of 16 H. 7, conferring certain additional privileges on the company, and, among others, that the master, wardens, and assistants of the said company for the time being, or the greater part of them, at any time or times, respectively should or might have full power and authority, by virtue of the said last-mentioned letters patent, to make, ordain, constitute, appoint, and set down such reasonable orders and ordinances in writing as to them, the said master, wardens, or assistants, or the greater part of them, for the time being, should seem meet and necessary, according to their good discretion respectively, as well for and concerning the oaths that should be administered to the master, wardens, assistants, and freemen of the said company, and the necessary officers of and concerning the same, as also for the good order, rule, and government of the master, wardens, assistants, and commonalty aforesaid, and all other members of the said society or thereunto belonging, in and touching all necessary matters and things concerning the same; and that whensoever the said master and wardens for the time being should make, ordain, and establish such orders, acts, and ordinances as aforesaid, they respectively should have power therein to provide and limit such reasonable pains, penalties, and punishments, either by fines or amerciaments, or by any other lawful ways or means whatsoever, upon all offenders, breakers.

neglecters, or non-observers of the same, or any of them, as the master, wardens, and assistants of the said company, or the major part of them, for the time being respectively, should think fit, necessary, and convenient; and that thereupon, or at any time after, the said master, wardens, or keepers of the commonalty of freemen of the mystery of Coopers, London, and of the suburbs of the same city aforesaid, or such of them whom it did concern, should or might, by virtue of the said last-mentioned letters patent, have, levy, recover, and take the said fines and amerciaments by action of debt or by distress of the goods and chattels of such offender or offenders, according to the laws and statutes of this realm; and the same fines and amerciaments so levied and taken should and might retain, convert, and enjoy to and for the common use and supportation of the said commonalty; all which acts, orders, and ordinances so as aforesaid to be made, his late Majesty King Charles the Second did will should be observed and kept under the pains and penalties therein to be contained, so as always such orders, ordinances, fines, and amerciaments be reasonable, and not repugnant or contrary to the laws and statutes of his said late Majesty King Charles the Second's realm of England, nor contrary to the due custom of his city of London. The declaration then averred, that after the making of the said letters patent of the said late Majesty King Charles the Second, and after the acceptance thereof as aforesaid, and before the commencement of this suit, to wit, on the third day of March, in the fourteenth year of the reign of our late sovereign lord King George the Second, one Bartholomew Clark then being master of the said company, and one Daniel Lambert and one John Harcourt then being wardens of the said company, and the major part of the then assistants of the said company being then assembled together at the common hall of the said company, did, by virtue of the power and authority by the said letters patent of his said late Majesty King Charles the Second to them given and granted to make, ordain, constitute, appoint, and set down such reasonable orders and ordinances in writing as to them seemed meet and necessary according to their good discretion respectively, as well for and concerning the oaths which should be administered to the master, wardens, assistants, and freemen of the said company, and the necessary officers of and concerning the same, as also for the good order, rule, and government of the master, wardens, assistants, and commonalty aforesaid, and all other members of the said society, or thereunto belonging, in and touching all necessary matters and things concerning the same, and not repugnant or contrary to the laws and statutes of this realm of England, nor contrary to the due custom of the said city of London; and by one of which said orders and ordinances it was then and there, and is (amongst other things) ordained and established by the then master, wardens, and the major part of the then assistants of the said company, by the authority aforesaid, that every year, on the first Tuesday in June, or within eighteen days then next after, the master, wardens, and assistants of the said society for the time being, or the greater part of them, should or might elect or choose three persons, being of the livery of the said company, to be stewards of the same company, to provide at their own proper costs and charges, (with such allowance out of the stock of the said company or otherwise as the master, wardens, and assistants of the said company for the time being, or the major part of them, should think fit and convenient: to be allowed in that behalf,) on the day when the Lord Mayor should be

presented at Westminster to take his oath, one dinner at the common hall of the said company, for the whole of the livery or clothing thereof:

And if any person or persons, so chosen steward or stewards aforesaid, should refuse to serve or hold the office of steward, and to do and perform as aforesaid, having no reasonable cause to the contrary, to be admitted and allowed of by the said master, wardens, and assistants for the time being, or the major part of them, then each and every of them so refusing should forfeit and pay to the master and wardens of the company, upon reasonable demand, the sum of 20*l.* to the use of the company; provided always, that if any person so elected as aforesaid should, within the space of one calendar month after notice given him of such his election, go before one of his Majesty's justices of the peace for the city of London or county of Middlesex, and make oath in writing that he was not at the time of such election, or at the time of making such oath as aforesaid, worth to the value of 300*l.* of lawful money of Great Britain, in estate real or personal, of any sort, kind, or nature whatsoever, or to that or the like effect, and should within the time aforesaid produce and leave the said writing with the master and wardens of the company, or either of them, then and in such case every such person should be wholly excused, freed, and discharged from all payments, fines, and forfeitures incurred by not conforming to the said ordinance; and in case any such person should in a subsequent year or years be elected again into the said office of steward of the said company, such person again making oath in writing, and producing and leaving it as aforesaid, should be excused, freed, and discharged as aforesaid, and so as often as the like case should happen: which said orders, by-laws, and ordinances were afterwards, to wit, on the third day of June, in the year of our Lord 1741, to wit, at London aforesaid, in the parish and ward aforesaid, examined and duly approved, ratified and confirmed by the Right Honorable Philip Lord Hardwicke, Baron of Hardwicke, then Lord High Chancellor of Great Britain, Sir W. Lee, knight, then Lord Chief Justice of his late Majesty King George the Second's Court of King's Bench, and Sir John Willis, knight, then Lord Chief Justice of his late Majesty King George the Second's Court of Common Pleas, according to the form and effect of the statute in such case made and provided; of which said orders, by-laws, and ordinances the said defendant afterwards, to wit, on the 5th day of June, in the year of our Lord 1827, to wit, at London aforesaid, in the parish and ward aforesaid, had notice. And the said plaintiffs in fact say, that after the making of the said orders, by-laws, and ordinances as aforesaid, and after the same were so examined, approved, ratified, and confirmed as aforesaid, and before the commencement of this suit, to wit, on the 25th day of May, in the year last aforesaid, being the Monday next before the feast of Pentecost, otherwise called Whitsuntide, in the year last aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, the said plaintiff Robert Carter was duly elected master of the said company, and the said plaintiffs Abraham Algar and James Francis Firth were duly elected wardens of the said company; and that the said plaintiffs afterwards, to wit, on the 5th day of June, in the year last aforesaid, being the first Tuesday in June, in the year last aforesaid, &c., were respectively duly sworn into the said offices of master and wardens of the said company, and from thence hitherto have been and still are respectively master and wardens of the said company, to wit, at, &c. And the said plaintiffs further say, that after the making of the said orders, by-laws,

and ordinances as aforesaid, and after the same were so examined, approved, ratified, and confirmed as aforesaid, and after the said defendant had notice of the same, and before the commencement of this suit, to wit, on the said 5th day of June, in the year last aforesaid, being the first Tuesday in June, in the year last aforesaid, to wit, at, &c., the said defendant and one Heffield Rosling, and one Thomas Giles, (they the said defendant, the said Heffield Rosling, and the said Thomas Giles, then and there being respectively of the livery of the said company,) were by the then master and the then wardens of the said company, and the major part of the then assistants of the said company for the time being, duly elected and chosen to be stewards of the said company for the purpose in the said by-law mentioned; of which said election and choice of him, the said defendant, he, the said defendant, afterwards, to wit, on, &c., at, &c., had notice. And the said plaintiffs further say, that although he, the said defendant, afterwards, to wit, on, &c., at, &c., was in due manner summoned to be and appear at the meeting of the said company to be holden on the 9th day of November, in the year of our Lord 1827, —being the day on which the Lord Mayor for the said city was presented at Westminster, to take his oath, — to take upon himself the office of one of the stewards of the said company as aforesaid, and although afterwards, to wit, on, &c., the Lord Mayor for the said city was presented at Westminster to take his oath, to wit, at, &c., and although he, the said defendant, did not, within the space of one calendar month after notice given him of such his election as aforesaid, go before one of his Majesty's justices of the peace for the said city of London or county of Middlesex, and make oath in writing that he, the said defendant, was not at the time of such election, or at the time of such making oath as aforesaid, worth to the value of 300*l.* of lawful money in estate real or personal, of any sort, kind, or nature whatsoever, or to that or the like effect; yet the said defendant, not regarding the said orders, by-laws, and ordinances as aforesaid, did not nor would provide for the whole livery or clothing of the said company a dinner on the said day when the Lord Mayor for the said city was presented at Westminster, to take his oath, nor serve or hold his said office of steward, but the said defendant (although he had no reasonable cause to the contrary) then and there wholly neglected and refused so to do, to wit, at, &c.; by means whereof, and by virtue of the said by-law, he, the said defendant, after the making of the said by-law, to wit, on, &c., at, &c., forfeited to and became liable to pay, and ought to have paid, to the said plaintiffs, so being the master and wardens of the said company as aforesaid, upon reasonable demand, a large sum of money, to wit, the sum of 20*l.* of lawful money to the use of the said company, which said sum of money, although afterwards, to wit, on, &c., and often afterwards, to wit, at, &c., reasonable demand thereof was made upon the said defendant by the said plaintiffs, so being the master and wardens of the said company as aforesaid, is still due and unpaid; per quod actio accrevit. The second count charged the defendant with not taking on himself the office of steward, and not providing dinner for the company, although he had no cause to the contrary. Demurrer and joinder.

*Taddy*, Serjt., in support of the demurrer. The custom as alleged is bad, and the defendant is not brought within it, even as alleged. The argument used in the *Master and Company of Framework Knitters v. Green*, 2 *Ld. Raym.* 113, applies exactly to the present case. "The bye-law itself is ill, because it is not said that this dinner was appointed to the end that the



company should assemble and consult of things beneficial to the corporation. For it does not appear but that this was only for luxury. Then the bye-law is unreasonable, to compel a man to make a dinner only for the luxury of others, without any benefit to himself or the rest of the company. Then the bye-law being unreasonable, the penalty to perform it is unreasonable also, and consequently not obligatory. *Quod curia concessit.* And (by the justices), members of corporations are not bound to perform bye-laws unless they are reasonable, and the reasonableness of them is examinable by the Judges. Then this bye-law to make the dinner, cannot be good in this case of a new corporation, because it does not appear to what purpose the dinner was made, and it may be only for good-fellowship. But if it had been to make the dinner to the end that the company might assemble and choose officers, or any other thing for the benefit of the corporation, it had been well enough." A bye-law in aid of a custom, might perhaps be good; *Wallis's case*, Cro. Jac. 555; or the custom of a corporation by prescription; *Gee v. Wilden*, 2 Lutw. 1320. Here an original custom is stated, and the corporation is by letters patent, not by prescription. At all events, the dinner was to be provided with such allowance as the company should think reasonable; but it is nowhere stated whether any allowance was made or not; nor whether the defendant was able to provide the dinner. For aught that appears, he might have been a beggar.

*Wilde*, Serjt., contra. There is nothing unreasonable in this bye-law, and it having been approved of (as appears by the pleadings) by Lord *Hardwicke* and the other Judges, every presumption is in its favour. The dinner is not required for the mere purpose of good-fellowship, but is given on the occasion of the Lord Mayor's coming to Westminster to be sworn into office, of which the Court may take judicial notice. Upon that occasion he is attended by the various city companies, and it is necessary that they should have some refreshment. The responsibility is limited, to provide dinner for a select body; and the fine for neglect is moderate. The case of the *Framework Knitters' Company v. Green* turns on the presumption that the dinner was to be given on a day on which the company had no business to transact; but the necessity of accompanying the Lord Mayor is a business of sufficient importance to justify the custom. It is admitted that a similar custom for a corporation by prescription would be good; it must, therefore, have been good at the time of the creation of such a corporation: if so, why should the same custom be esteemed bad when adopted by a corporation under letters patent? In *Wallis's case* such a custom was holden good: why then should a bye-law in support of it be deemed bad? In *Taverner's case*, Sir T. Raym. 446, a bye-law to enforce the payment of a sum of money upon becoming a member of a company was held good, because a party became a member voluntarily; and the same argument is applicable to the present case. In the *Vintners' Company v. Passey*, 1 Burr. 235, *Denison*, J., said in answer to the objection, that the person elected might be unable to pay, "We can never intend that the company would choose persons not meet and convenient." And in *King v. Ashwell*, 12 East, 22, Lord *Ellenborough* said, "In order to avoid a bye-law upon the ground of its being unreasonable, because of some inconvenience that may result from it, it should appear to be a *probable* inconvenience; for one can hardly predicate of any law that some possible inconvenience may not result from it." Here the defendant has not advanced a single fact to show that the custom is inconvenient or unreasonable. As to the omission to state an allowance for the dinner, the company could not be called on to make the allowance unless they had the dinner.

*Best*, C. J. The declaration is insufficient, for want of an averment that the company had offered the defendant the due allowance towards

the expense of the dinner. But the by-law has every vice that a by-law can have. No doubt a by-law to give a feast may under certain circumstances be good ; it may be for the benefit of the corporation, because, if they are called together for purposes of business, it is necessary they should have refreshment, and it may be proper to point out the individual who shall provide it. A custom to such effect, as in the case in *Croke*, may be good upon the admission of members, because upon such occasions all the body are called together. That decision, however, is of doubtful authority, because, though a corporation may sue for a fine, they cannot imprison, as they are supposed to have done there.

But a by-law such as the present cannot be good ; the expense of the dinner is a burden cast on the steward, for which no sufficient reason is alleged. The company are not supposed to be called together for business, but for mere luxury, according to the language in *Lord Raymond* ; and the by-law is one which their charter does not authorize them to make, for it is impossible that a dinner uncalled for by purposes of business can be justified under a power to make by-laws for the good regulation of the company. The case in *Lord Raymond*, therefore, is immediately in point. As to the by-law's having had the sanction of the Chancellor and the Judges, the by-law in the case just alluded to must have had that, for it is requisite to all. The by-law there was to give a dinner to a company on a stated day, or pay a penalty ; and it did not appear that any business was to be performed on the occasion ; it was argued, " the by-law is ill, because it is not said that this dinner was appointed to the end that the company should assemble and consult of things beneficial to the corporation ; it does not appear but this was only for luxury ; " to which the Court agreed, " as members of corporations are not bound to perform by-laws unless they are reasonable ; and the reasonableness of them is examinable by the Judges. Then this by-law cannot be good in this case of a new corporation, because it does not appear for what purpose the dinner was made, and it may be only for good fellowship." If that by-law was bad, this must be bad also ; the dinner not being required for any purpose but good fellowship.

There is also an uncertainty as to what the master is to contribute, which is an essential defect in the law ; but it is bad on another ground of no light importance, — the impolicy of multiplying oaths, — which ought not to be administered except on solemn occasions for the purposes of justice. This law is enforced by a penalty of 20*l.*, which a defaulter must pay, unless he will degrade himself by swearing he is not worth 300*l.* ; an oath which it is illegal to take, and illegal to administer. The oath which must be taken to excuse a man from serving the office of sheriff is necessary for the purposes of justice, in the administration of which the sheriff is deeply concerned ; but it is not necessary that an oath should be administered upon the occasion of a dinner, for good fellowship.

BURROUGH, J. (a) If this decision were to turn solely on the oath, I should have desired time to consider the point, because an oath is not unusual on similar occasions. But the declaration is bad for want of an averment that a due allowance had been made to the defendant in respect of the dinner ; that allowance is a condition precedent by the very terms of the by-law, for the kind of dinner must altogether depend upon the amount of the allowance.

GASELEE, J. I think the declaration is bad, for the reason assigned by my brother *Burrough*. The party who was to provide the dinner was

to have an allowance for so doing, and to provide accordingly; and the tender of the due allowance ought to have been averred.

On the by-law itself I give no opinion. I doubt whether we can, as it has been contended, judicially take notice of the proceedings on Lord Mayor's day, or of the companies that attend on the occasion in Westminster Hall. At all events, it might have been alleged in this declaration, that the company to which the defendant belongs was bound to attend, and that the dinner was provided in consequence of such attendance. On this by-law, too, as laid in the declaration, the same person might be appointed to serve as steward every year; and if there be any restriction to such reappointment, it ought to have been stated.

I give no opinion on the point, whether justices of the peace should administer the oath which has been referred to, although I think it desirable that some other mode should be devised of establishing a right of exemption to serve the office of steward. Judgment for the defendant.

(a) *Park, J.*, was absent.

### HENLY v. The Mayor and Burgesses of LYME. — p. 91.

An individual who has suffered loss in consequence of the decay of sea-walls, which a corporation is directed to repair under the terms of a grant from the crown conveying a borough, and pier or quay with tolls, to the corporation, may sue the corporation for damages.

CASE, for neglect to repair sea-walls, per quod, &c. At the Dorchester Spring assizes, 1828, before *Littledele, J.*, after the evidence had been gone through, a verdict was, by consent of counsel on both sides, taken for the plaintiff on the two first counts of the declaration.

The first stated, That on the 20th of June, in the tenth year of Charles 1, to wit, at the parish of Lyme Regis, in the county of Dorset, our said late sovereign, by his certain letters patent duly sealed in that behalf, after reciting as therein was recited, did for himself, his heirs and successors, (amongst other things,) give, grant, and confirm to the mayor and burgesses of Lyme Regis aforesaid, and their successors, the borough or town of Lyme Regis; and also all that the building called the pier, quay, or cob, of Lyme Regis; with all and singular the liberties, privileges, profits, franchises, and immunities to the same town or to the same pier, quay, or cob in any wise howsoever belonging or appertaining; to have, hold, and enjoy the aforesaid borough or town, and also all that the building aforesaid, called the pier, quay, or cob of Lyme Regis, with all and singular the liberties, franchises, privileges, and immunities, to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, to the only and proper use and behoof of them, the same mayor and burgesses of the borough aforesaid, and their successors, in fee farm forever; yielding of fee farm to our said late King Charles 1, his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned; and our said late sovereign King Charles 1 did further of his abundant special grace, and of his special knowledge and mere motion, for himself, his heirs, and successors, pardon, remise, and release to the same mayor and burgesses of the borough or town aforesaid, and their successors forever, twenty-seven marks, parcel of thirty-two marks of the farm of the same borough and the liberties thereof, anciently by letters patent or in any

other manner due ; and did direct that the aforesaid mayor and burgesses of the borough of Lyme aforesaid, and their successors, all and singular the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in any wise belonging or appertaining or situate between the same borough and the sea, and also the said building there called the pier, quay, or the cob, at their own costs and expenses thenceforth from time to time forever, should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient ; and further, did grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the same borough for the time being forever thereafter should be clerk of the market within the borough or town aforesaid, and the liberties and precincts of the same ; and that the mayor of the borough aforesaid for the time being should do and execute, and might and should be able to do and execute there forever all and whatsoever to the office of clerk of the market of our said late King Charles the First's household there pertained to be done and performed, so nevertheless that the clerk of the market of our said late King Charles the First's household for the time being, together with the aforesaid mayor for the time being, might exercise the office above said, and intronit when he would to do any thing which pertained to the office of clerk of the market there in the borough aforesaid, and the liberties and precincts of the same ; and further, our said late King Charles the First, for himself and his heirs and successors, did, by his said letters patent, give and grant to the said mayor and burgesses of the borough and town aforesaid, and their successors, all and singular the fines, amerciaments, and sums of money before the said clerk of the market of the town or borough aforesaid, or the clerk of the market of the said late King Charles the First, or his deputy, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of said letters patent forfeited or thereafter to be forfeited and assessed in the same borough, to have and enjoy to the same mayor and burgesses of the borough aforesaid, and their successors, to the use of the aforesaid mayor and burgesses and their successors forever, of the said late King Charles the First's gift, without account or any other thing for the same to our said late King Charles the First, his heirs or successors, in any wise howsoever to be rendered or paid, and to be levied by their own servants and ministers without estreats thereof to be sent to the exchequer of our said late King Charles the First ; and, moreover, of his more ample special grace, and of his certain knowledge and mere motion, our said late King Charles the First did will and by letters patent did for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, full power, authority, and license from time to time forever to dig stones and rocks in any places whatsoever within the borough and parish of the town aforesaid, out of the sea and on the sea-shore in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier, quay, or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the building aforesaid ; and our said late King Charles the First did also by his said letters patent will and grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the same mayor and burgesses and their successors should have, hold, use, and enjoy, and might and should be able

fully, freely, and entirely to have, hold, use, and enjoy forever all the liberties, free customs, privileges, authorities, acquittances, and licenses aforesaid, according to the tenor and effect of said letters patent, without the let or impediment of said late King Charles the First, his heirs or successors whomsoever, our said late King Charles the First willing not that the same mayor and burgesses and inhabitants of the borough or town aforesaid, or either or any of them, by reason of the premises or either or any of them, should be thereof hindered, molested, aggrieved, or vexed, or in any thing disturbed by him the said late King Charles the First, or his heirs, or by his or their justices, sheriffs, escheators, or other the bailiffs or ministers of the said late King Charles the First, his heirs or successors whomsoever; which said letters patent the mayor and burgesses of the borough aforesaid, afterwards, to wit, on the same day, &c., to wit, at, &c., duly accepted, and the same thence hitherto have been and still are one of the governing charters of the said borough, to wit, at, &c. And plaintiff further said, that said mayor and burgesses from the time of their acceptance of the said letters patent hitherto have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by such letters patent as aforesaid:

That before and at the time of the committing of the grievances by defendants as thereafter next mentioned, plaintiff was lawfully possessed of and in divers, to wit, five messuages, five cottages, five buildings, and divers, to wit, twenty closes of land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid:

That before and at the time of committing of the grievances by defendants as thereafter next mentioned, divers, to wit, five other messuages, five other cottages, five other buildings, and divers, to wit, twenty closes of other land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid, were in the possession and occupation of divers persons as tenants thereof respectively to plaintiff, the reversion thereof then and still belonging to plaintiff, to wit, at, &c.:

All which said several messuages, cottages, buildings, and closes of land, with the appurtenances, before and at the time of the committing the several grievances by defendants as thereafter next mentioned, were abutting on or near the sea-shore there, to wit, &c.:

That before and at the time of the sealing of said letters patent, and the acceptance thereof as aforesaid, by said mayor and burgesses, and also at the time of the committing of the several grievances by defendants as thereafter next mentioned, divers, to wit, ten buildings, ten banks, ten sea-shores, and ten mounds, had been, and were then respectively standing and being within the borough of Lyme Regis aforesaid, and divers, to wit, ten other buildings, ten other banks, ten other sea-shores, and ten other mounds, had been, and respectively were belonging and appertaining to said borough; and divers, to wit, ten other buildings, ten other banks, ten other sea-shores, and ten other mounds, had been and were at those times respectively standing and being and situate between said borough and the sea, to wit, in the borough aforesaid; all which said buildings, banks, and sea-shores, and mounds respectively, at the times of the committing of the several grievances by the defendants, as thereafter next mentioned, were near to, and then and there constituted and formed and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several

messuages, cottages, buildings, and closes of land of the plaintiff, with the appurtenances aforesaid, and then and there have hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing on, upon, against, or over said several messuages, cottages, buildings, and closes of land last aforesaid; and all which buildings, banks, sea-shores, and mounds, defendants, at the times of the committing of the several grievances by them as thereafter next mentioned, were, under and by virtue, and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable to, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable to, and ought, at their own proper costs and charges, well and sufficiently to repair, maintain, and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to said messuages, cottages, buildings, and closes of plaintiff, by the sea, or the waves, or waters thereof, to wit, at, &c. Yet defendants, well knowing the premises, and not regarding the said letters patent, or their duty in that behalf, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to deprive him of the use and benefit of his several messuages, cottages, buildings, and closes first above mentioned, and also to injure, prejudice, and aggrieve him, plaintiff, in his reversionary interest of and in said messuages, cottages, buildings, and closes secondly above mentioned, so being in the possession and occupation of the said persons as tenants thereof to him, the plaintiff, as aforesaid, and in which he, plaintiff, was so interested as aforesaid, theretofore, to wit, on the 1st January, 1821, and from thence for a long space of time, to wit, continually, until the commencement of this suit, to wit, at, &c., wrongfully and unjustly suffered and permitted the said buildings, banks, sea-shores, and mounds, to be and continue, and the same during all the time aforesaid were ruinous, prostrate fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper, and necessary repairing, maintaining, and supporting the same, to wit, at, &c., by means of which said several premises the sea, and the waves and waters thereof, afterwards, to wit, on the same 1st January, 1821, and on divers other days and times between that day and the commencement of this suit, to wit, at, &c., ran and flowed with great force and violence in, upon, under, over, and against said several messuages, cottages, buildings, and closes of plaintiff, and in which he was so interested as aforesaid, and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages, cottages, and buildings, and the materials of the same messuages, cottages, and buildings, together with divers, to wit, ten thousand cartloads of the earth and soil; and divers, to wit, five acres of the said several closes were washed and carried away, to wit, at, &c. By means of which said several premises, plaintiff not only lost and was deprived of the use, benefit, and enjoyment of his said messuages, cottages, buildings, and closes in that count first above mentioned, but was also thereby then and there greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in said several messuages, cottages, buildings, and closes in that count secondly above mentioned, so being in the possession and occupation of said persons as tenants thereof to plaintiff as aforesaid, and in which plaintiff was so interested as aforesaid; and plaintiff had been and was, by means of the

premises aforesaid, otherwise greatly injured and damnified, to wit, at, &c.

The second count stated, — that Charles the First, by his letters patent, “after reciting as therein is recited, and after, among other things, giving and granting to the mayor and burgesses of the said borough certain privileges and advantages, did direct that the said mayor and burgesses and their successors should, from time to time forever, when it was necessary or expedient, repair at their own costs, all the buildings, banks, sea-shores, and other mounds to the borough belonging or appertaining, or situate between the borough and the sea; which said last-mentioned letters patent, the said defendants, afterwards, to wit, on, &c., at, &c., duly accepted: that the plaintiff before and at the time of the committing of the grievances by the defendants, as thereafter mentioned, was lawfully possessed of divers, to wit, five other messuages, &c., and divers, to wit, five other messuages, &c., were in the possession of tenants to the plaintiff, the reversion thereof being in the plaintiff, all which messuages, &c., were abutting on or near the sea-shore,” — and then proceeded nearly verbatim as in the first count.

The remaining counts, on which a verdict was taken for the defendants, alleged the liability to repair as accruing *ratione tenuræ*.

*Merewether*, Serjt., moved for a rule calling on the plaintiff to show cause why the judgment should not be arrested on the two first counts, chiefly on the ground that the defendants’ obligation to repair the sea-walls being imposed by the letters patent of Charles the First, the crown alone could take advantage of a breach of the conditions of that instrument. That the plaintiff, a mere stranger to the deed, could claim no right under it. That, although an individual might sue a public officer for the neglect of a duty the performance of which the individual might claim of common right without any grant, yet that where a person could never have obtained a given benefit, except as resulting incidentally from a contract between the crown and its grantee, the loss of that benefit was not a wrong for which he could claim any redress by action.

A rule nisi having been granted,

*Wilde*, Serjt., showed cause. The defendants, by the acceptance of the grant from the crown, upon condition of keeping up the sea walls, and also as owners and occupiers of the soil, as alleged in the first count of the declaration, are liable, *ratione tenuræ*, to repair those walls; and any individual who suffers by their neglect is entitled to sue them for damages. Where a party is liable to repairs in respect of the ownership of property, the source from which the property is derived is immaterial: for instance, the liability may accrue under an act of parliament, as well as by prescription: *Rex v. Kerrison*, 3 M. & S. 526. In *Russell v. The Men of Devon*, 2 T. R. 667, an action was brought against the inhabitants of a county for an injury sustained by an individual in consequence of a bridge being out of repair, and the Court decided against the plaintiff solely on the ground that the inhabitants of the county were not a corporation. In the case of *Popkum v. The Prior of Breamore*, 11 H. 4, 82, 83, one of the judges said: “If he do not scour the foss, trespass lies.” So in *Steinson v. Heath*, 3 Lev. 400, “an action lies for not repairing a bridge by which I am to pass.” 1 Roll. Abr. 104, pl. 1, 2, which refers to 11 H. 4, 82, 83. And it is immaterial whether the party bound to repair be an individual or a corporation. So, an action lies against the owner of a town mill for not grinding; against the owner of a ferry for not keeping his boat in repair (Com. Dig., Action on the case for negligence, A. 3); and in some instances against the parson of a parish for not keeping a bull; *Yielding v. Fay*, Cro. Eliz. 569.

From these decisions it appears, that where a party is liable to the performance of a public duty, an injury sustained by a neglect of that duty may be the subject of an action at the suit of an individual; Com. Dig. ubi supra. The repair of these walls was a public duty cast on the defendants by the acceptance of letters patent from the crown, and by the possession of the property of the borough. It is contended, indeed, that the plaintiff is a stranger to the grant from the crown, and cannot, therefore, take advantage of any of the covenants or conditions attached to it. But a grant from the crown is to be considered largely, and with a view to the advantage of the public, for whose benefit reservations may be made, even in grants by individuals. 11 H. 7, fol. 12, pl. 3, 12 H. 7, fol. 18, and in *Callis*, 118, it is laid down, that "a man may be bound by his covenant to repair a wall, bank, sewer, or other such like matter, and he may bind himself and his heirs to do the same: but yet this covenant will not bind his heirs after his death, unless there be left assets in fee simple, to descend to the said heir from the said ancestor which made the covenant." "But if land be charged therewithal by tenure or otherwise, as a charge imposed upon land by prescription, then the said lands are therewithal chargeable in cujuscunque manus devenerint; quod nota." These grantees, therefore, took the property subject to the burthen of repairs. In *The Mayor of Lynn v. Turner*, Cowp. 87, a corporation was sued for not repairing a creek of the sea; they were charged, indeed, by prescription; but Lord *Mansfield* said, "It might be the very condition and term of their creation or charter," and the judgment for the plaintiff was affirmed. But the principle on which individuals are permitted to sue for a neglect of public services under a prescription, is, that the services were reserved on due consideration by the grantor of the property in respect of which they are to be performed; and any act which occasions an inconvenience in the exercise of a public right, may be the ground of such an action. *Greasly v. Codling*, 2 Bingh. 263. The corporation would not lose their claim to tolls, even by a neglect of the duties they have undertaken; *Peter v. Kendal*, 6 B. & C. 703, and they cannot be permitted to enjoy the advantage of the grant, and reject the burthen. It may be said, they may be proceeded against by mandamus: a mandamus, however, would not restore the plaintiff's house, or redress the injury he has sustained.

But, independently of the grant from the crown, the defendants, as owners of the frontage, whether in possession or not, *Payne v. Rogers*, 2 H. Bl. 349, are liable to repair these walls *ratione tenuræ*. *Callis* says (115), "Frontage is where the ground of any man do join with the brow or front thereof to the sea, or to great and royal streams; and it seems that the frontages are bound to the repairs." *Charnley v. Winstanley*, 5 East, 266, and *Perreau v. Bevan*, 5 B. & C. 284, are authorities to show that against the defendants, even as owners, the breach of duty is sufficiently alleged.

*Taddy and Merewether*, Serjts., in support of the rule. There is nothing in the two first counts of the declaration to charge the defendants *ratione tenuræ*. It does not so much as appear that they were in possession of the walls in question, but merely that certain shores, mounds, &c., were within the borough. Nor does the record contain anything to show that the defendants were liable to the discharge of a public duty, or that they might have been indicted for neglect of it. The charge, such as it is alleged, arises within time of legal memory, on letters patent in the reign of Charles the First; but no decision can be found in which a corporation has been charged otherwise than by prescription or *ratione tenuræ*. It is not sufficient to show that grounds exist which would have borne out an allegation of prescription; it must actually be alleged that the thing required, if not of common right, has been done immemorially; *Rez v. Great Broughton*,



5 Burr. 2702, *Rez v. Sheffield*, 2 T. R. 111, *Star v. Rookesby*, Salk. 335. In *The Mayor of Lynn v. Turner* it was expressly alleged that the corporation had been used immemorially to repair. So in *Rez v. Mayor of Stratford*, 14 East, 348. The cases of the ferry, the parson's bull, and of the town mill, are all prescriptions; and in *Rez v. Kerrison*, 1 M. & S. 435, the Court resisted an attempt to charge a party by reason of his being owner and proprietor, instead of charging him *ratione tenuræ*: so that the defendants are not chargeable, even though it should appear on the first count that they are owners of the borough. It is argued that the crown has made this grant on condition of certain services. But there is no difference between a grant from the crown and a grant from a subject; and a stranger cannot avail himself of the reservations in the grant. Nor were the services reserved a public duty. If they were the condition of the grant, it was a condition which the crown as grantor might remit, as it did actually remit the payment of the twenty-seven marks. But the test of a public duty is, that the crown cannot remit it; and the punishment for neglect to render services reserved under the grant of a franchise, is loss of a franchise; 2 Inst. 219, c. 31. Lord Coke, there, says nothing of indictment as one of the punishments. In *Rez v. The Earl of Exeter*, 6 T. R. 373, the defendant, who was indicted for not repairing a gaol, was charged by immemorial usage, and not under the reservations in a grant. In *Greasly v. Codling* the action was brought for a nuisance in stopping a road, and not for a mere omission. The defendant had been guilty of a misfeasance, by which the plaintiff had been put to trouble and expense, and that had before been held a sufficient ground of action in *Rose v. Miles*, 4 M. & S. 101. The passage in Callis (115) can scarcely be deemed authority, for the writer adds, "And he whose grounds are next adjoining to a highway, is bound to repair the same:" a proposition which clearly is not law.

Then, the duty or service required is laid too largely. It is not alleged that the houses which have suffered by the sea were standing at the time of the grant; and it cannot be contended that under that grant the defendants are bound to protect modern erections.

The liability to repair the walls, also, is laid without qualification; and if judgment should be given for the plaintiff on this declaration, the defendants would be liable not only to common repairs, but to make good devastations occasioned by extraordinary tempests; a duty which does not fall within any liability to repair: *Keighly's case*, 10 Rep. 139. It ought to have been alleged, too, that the defendants had sufficient funds to enable them to carry on the repairs, since that service is stated in the declaration to be the condition of receiving the tolls. There is nothing, however, in the language of the grant to constitute such a condition, for a condition cannot be created without words of condition or their equivalent; 1 Roll. Abr. Condition, p. 407, l. 30. *Cur. adv. vult.*

BEST, C. J. It appears by the first count of the declaration in this case, that the defendants are the grantees of the borough of Lyme, and of the market, and of certain tolls and dues arising from the possession of a pier or cob; and it appears by a public act of parliament relating to the borough of Lyme, that these tolls and dues the corporation of Lyme have had from all time, at least as far as legal memory can go; but a verdict has been found for the defendants on all the counts which charge them with being liable to repair *ratione tenuræ*: and a verdict has been found for the plaintiff only upon two counts, one of which charges that these tolls (which it appears from the declaration were in the crown before the granting of the last charter, and had been granted before to the town of Lyme on different terms) were in the time of Charles the First granted to the

town of Lyme, together with the borough, the right of digging stones upon the shore, and certain other rights which it is unnecessary to enumerate; and then comes that on which this question arises, and which is the condition on which the grant was made: "That the corporation of Lyme and their successors, all and singular the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in any wise belonging or appertaining, or situate between the same borough and the sea, and also the said building then called the pier, quay, or the cob, at their own costs and expenses, thenceforth from time to time forever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient:" then it is stated "that before the committing of the grievances in question, divers messuages and cottages, and buildings, and divers closes of land, with the appurtenances in the borough aforesaid, were in the possession and occupation of divers persons, as tenants thereof respectively to the plaintiff, the reversion thereof then and still belonging to the plaintiff; all which said several messuages, cottages, buildings and closes of land, with the appurtenances, before and at the times of the committing of the several grievances by the said defendants, were abutting on or near the sea-shore there; that before and at the time of sealing of the said letters patent, and acceptance thereof as aforesaid by the said mayor and burgesses, and also at the time of the committing the several grievances," — so that this allegation relates not only, as it was supposed at the bar, to the time of committing the grievances, but to the time of granting the letters patent, — "as well divers buildings, banks, sea-shores, and mounds had been and were respectively standing and being within the borough of Lyme Regis aforesaid, and were belonging and appertaining to the said borough, and divers other buildings, &c., situate, and between the said borough and the sea-shore, then and there constituted and formed, and were a protection and safeguard," that is, at the time of the letters patent, "and still of right ought to form and be a protection and safeguard to the messuages, cottages, buildings, and closes of land, with the appurtenances, and then and there to have hindered and prevented, and still of right ought to hinder and prevent the sea, and the waves and waters thereof, from running or flowing in, upon, against, or over the said several messuages, cottages, buildings, and closes of land aforesaid; all which buildings, banks, sea-shores, and mounds the said defendants at the times of the committing the grievance were, under and by virtue and in pursuance of the letters patent, and the acceptance thereof, liable, and at their own proper costs and charges, sufficiently to repair." Then the first count goes on to state that, in breach of this duty, they permitted these sea-banks, sea-walls, mounds, &c., to be prostrate, ruinous, and decayed, so that the sea came in and overran the ground, and overran the cottages which were standing on the ground, and did the mischief which is the subject of complaint.

Now, it has been insisted, in the first place, that the plaintiff claims a degree of protection which the charter does not give him. I think there is no foundation for that argument; for the charter was given expressly for the purpose of protecting the land; and the walls, which the corporation were to keep up for that purpose, have been suffered to become in such a state of ruin, that they are incapable of protecting the land, and consequently the houses put on the land have suffered; the plaintiff therefore, does not make a larger claim to protection than he is warranted

to make under the grant, provided he is entitled to any protection under that grant.

It is next insisted, the crown probably might have a right to complain, but that an individual cannot maintain an action for any injury he has sustained from the corporation of Lyme not having fulfilled the trusts which the crown reposed in them at the time of the granting this borough; or, rather, not having executed the duty which was the consideration of the grant.

Now, I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are no numerous, that it would be a waste of time to refer to them.

Then, what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation, in whatever shape, whether from the crown or otherwise, is constituted a public officer.

Bishops, certainly, are paid by the crown, not in money, but by estates which have been granted to them; and in consequence of the grant of such estates, certain duties have been imposed on the bishops; such, for instance, as holding ecclesiastical courts. Does any man doubt, if a bishop, by neglect to hold an ecclesiastical court, prevents an individual from obtaining a probate of a will, by which he sustains an injury, an action might be maintained against such bishop for the consequence of that neglect? Clergymen are public servants to a certain extent, although undoubtedly they are not paid by the public. The emoluments which they receive have not been derived from the public; they have been derived from the owners of particular lands, who have endowed them with the glebe or tithes which they possess; yet they have duties cast on them as the consequence of the tenure of those lands and tithes, such as, for instance, to administer the sacrament; and it has been decided, that if a clergyman refuse to administer the sacrament to a man who is thereby prejudiced in his civil rights, an action is maintainable against the clergyman. So if a clergyman were to neglect to register a person brought to be baptized, and in consequence of that, such person should lose an estate, does any man doubt an action could be maintained against him? If the Bank of England refuse to transfer stock, an action may be maintained against them.

Lords of manors hold courts, which courts they are obliged to hold, as one of the considerations on which the lands have been granted to them. If a lord of the manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, does any man doubt an action could be maintained against such lord?

It seems to me that all these cases establish the principle, that if a man takes a reward — whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be in lands or money from any individual — for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action. If that be so, then it is quite clear that the plaintiff in this case is entitled to maintain this action. The plaintiff may say to the corporation, "You have a compensation from the crown for discharging the duty which you have neglected

to discharge; and in consequence of that neglect I have sustained an injury; I am, therefore, entitled to have a compensation from you."

But it has been argued, that this only applies to acts, and not to mere omission. That argument cannot be sustained, because in the case which has been referred to from Cowper, the thing complained of was a mere omission or negligence. I should say, therefore, that whether the King ever was bound to keep up these sea-walls or not, the King having thought proper to make the grant for the benefit of the public, (for it cannot be supposed that the King made this grant, that the good men of Lyme should expend the dues so granted either for their individual advantage or in feasting,) the instant they accepted it for the benefit of the public, they took on themselves the responsibility of discharging those duties to the public, which it is expressly declared they were to discharge at the time they accepted the borough; and having neglected them, they have become responsible. That would be my opinion, even if I should be satisfied that the King never was bound to repair these walls; but I am convinced that the King was bound at one time to repair these walls, and that the King has shifted the liability which belonged to him upon those to whom he has granted the estate.

Now, if the King was bound to repair the walls, and has granted an estate to a person on condition that he shall do it, no man can doubt that this is a binding and valid condition. A man who is bound to do certain acts by reason of the tenure of certain property, if he grants that property, or any part of it, may make it a condition of his grant or his lease that the grantee or lessee shall do that which he was bound to do.

I do not mean to state that the King, by his general prerogative, was bound out of any funds which belonged to him to repair the sea-wall. He never was so bound. The King by his prerogative, as will be found in every book on the prerogative of the crown, is bound to take care to guard and to protect the shores and lands adjoining the sea from being overflowed by the sea; he is to discharge that duty as it was discharged before the statute of Henry the Eighth, by issuing commissions and making ordinances, which we find he certainly was in the habit of making before the statute of Henry the Eighth; calling on persons who had lands near the sea to do their duty in protecting their own lands, and the lands of others, from the incursions of the sea. But it appears here that the King was the owner of the lands of the town of Lyme; for it appears on this record, that the King granted the borough of Lyme: then although the King might not have all the demesne lands in the town of Lyme at the time of the grant, yet there is ground to presume that the King, at some time, was owner of all the land in the town of Lyme; for the Court of King's Bench held, in the case of *Lord Pelham v. Pickersgill*, 1 T. R. 660, if you show that a party is lord of a manor, you may upon that raise the presumption that at some time or other he, or his ancestors, were in possession of all the demesnes of the manor, because the legal history of this country shows that originally all the land belonged to the lord of the manor, and was granted out to the tenants on different conditions and on different services. Proving, therefore, that a man is lord of the manor, is sufficient to raise the presumption that in ancient times he was the owner of all the lands within the manor. If that be the case, if the King was lord of the manor, if the King could grant the borough, if the King could grant the sea-shore, that is ground on which we will presume, without its being stated

on the record, because it is a legal presumption, that the King was at one time the owner of all the lands within the town of Lyme. If he was owner of all the lands within the town of Lyme, was it not his duty at that time to repair the sea-banks? We find from Callis, that it was the duty of the King at common law to protect the shores from the incursions of the water; but that it became necessary, in consequence of the sea gaining on particular parts of the shore, to have higher mounds and higher banks than particular individuals were bound to put; and, therefore, it was necessary to raise such mounds and banks by taxation of other parts of the public who derived benefit from those walls. But who in the first instance were bound to repair? Who were bound to keep up the sea-banks? The owners of the banks. And who were bound to keep up the sea-walls? Those who had been in the habit of keeping up and repairing them. According to Callis, 115, "Frontage is, when the ground of any man do join with the brow or front thereof to the sea, or to great or royal streams; and in cases of the sea or royal rivers, property of the banks and grounds adjoining are and belong to the subject when lands do but and bound thereon; but the soil of the sea and royal rivers do appertain to the King, as formerly in my tractate on rivers may appear. But in cases of petty and mean rivers, the soil of them, as well as the banks thereon, do appertain to them whose grounds adjoin thereto; so that frontage and ownership in base, inferior rivers do not differ; but in great streams and the sea they do vary as aforesaid; and it seems that the frontages are bound to the repairs, and that he whose grounds are next adjoining to a highway, is bound to repair the same." It was objected that that was stated too largely; and, certainly, if it be taken that the owner of the lands adjoining every highway is bound to repair the highway, it is too large: but I apprehend, the writer means, that where a man has enclosed on the highway, he is bound to repair. Then he adds: "The ownership of a bank, wall, or other defence is a sufficient warrant to impose the charge of repairs thereof upon him, without being tied thereto by prescription."

If that be so, how stands this case? The King grants this bank or wall, must he not have been the owner? If he was not, he could not make the grant. Then, if he was the owner of banks or walls, we have it here, on the authority of Callis, that he, as owner of them, was bound to repair. If, as the owner of the banks or walls, he was bound to repair, without any prescription, when he made the grant, could he not cast the obligation on another? It seems to me it is perfectly clear, from what is stated on the record, that the King was bound, as owner of the town of Lyme Regis, which, probably, was so called from the property of the town being in him, and as the owner of these very banks and walls, to repair these banks and walls. When he granted to the corporation of Lyme the profit and advantage of the tolls, he transferred to them, at the same time, the liability which the receipt of that profit and advantage imposed on him.

I am, therefore, of opinion, that it sufficiently appears on this record, that the defendants were bound to repair.

But it has been said, it does not appear that they have any funds wherewith to do it. As long as they hold this estate, whether the estate produces funds or not, they are bound to repair. When they do not like to undertake the repair, let them desire the King to take back the estate. The moment they accepted the estate, they contracted the liability to repair; and that liability to repair will attach itself to them as long as they continue to be the owners of the estate.

It would be a most dangerous thing to allow a corporation which takes lands under circumstances in which this corporation has taken lands, to say, that "although we have taken these lands cum onere, subject to these repairs, we have not funds wherewith to repair, and, therefore, we cannot do it." In such a case the Court would have to go into an inquiry how the funds had been employed, and it would be extremely improper to impose the necessity of such an inquiry on any court. The learned Judge who tried the cause did perfectly right in rejecting evidence to such a point. The public have nothing to do with that. The plaintiff has nothing to do with that: as one of the public, all he has to inquire into is, who are liable to repair. On these grounds, I am of opinion there is no reason for arresting the judgment.

I had omitted to mention another point. It is alleged that the defendants are only commonly liable to repair the walls. Undoubtedly that is all they are bound to do. In a case which I tried at Gloucester, an issue was directed by the Court of Chancery, to ascertain whether the owners of land, who were bound to keep certain sea-walls in repair, were answerable for a particular loss that had happened; and I was directed to inquire whether that loss had happened in consequence of an extraordinary high flood of the sea, or in consequence of those mounds not being kept in proper repair. The jury found that the mounds were kept in good repair, and that the accident had happened from such a high tide as never had occurred before in the memory of man. I should say, if in this case it had appeared this damage had not happened from any defect of the wall, but had happened from an extraordinary high flood, these defendants would not have been bound to make good the repairs; but it was decided in *The King v. The Commissioners of Sewers for Essex*, 1 B. & C. 477, that if a man is bound to repair certain walls, although the flood be very high, yet if it be found that the walls were out of repair, he is liable, because the high flood would probably not have occasioned the mischief if the walls had been in the state he was bound to keep them. In the present case, if there was a high flood, or an extraordinary high tide it was matter of defence. But it is distinctly stated on this record that the mischief happened from these walls being suffered to be prostrate, ruinous, and in decay, so that the mischief is not from the act of God; the mischief is from the negligence of man, and from the negligence of man only.

GASELEE, J. It has been argued, that the obligation is laid too largely in this declaration; but by analogy to the case of a common carrier, this is stated in the same way; there, you state the liability of the common carrier to carry safely and securely, and you do not except the act of God and the King's enemies, which are the known exceptions; so here it is properly stated to be a general obligation to repair: if by the act of God an extraordinary storm comes, that is a defence, and it is not necessary to state it in the declaration.

Rule discharged.

In Michaelmas term an application was made, on the part of the plaintiff, to the Chief Justice to order the verdict to be entered up on the first count of the declaration, to which the foregoing judgment appears chiefly, if not exclusively, to apply. The parties were required to make their application to Mr. Justice *Littledale*, and it was "ordered that all further proceedings in this cause be suspended until this Court shall otherwise order." On the 18th December, Mr. Justice

*Littledale*, after hearing both sides, declined to interfere, on the ground that the verdict had been taken in the present form before the cause had been heard to its conclusion, by mutual agreement, and that he could not alter the terms of that agreement when either of the parties to it objected to such alteration.

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**FURNESS, Assignee of ALEXANDER COPE and Others, Bankrupts, v. WILLIAM COPE. — p. 114.**

A banker's ledger is receivable in evidence to show that a customer had no funds in the banker's hands.

THIS was an action of assumpsit to recover money alleged to have been paid by Alexander Cope to the defendant under a fraudulent preference.

In order to show the state of the affairs of the bankrupt and his partners just before their bankruptcy, the plaintiff at the trial, before *Best*, C. J., London sittings after Easter term, produced the ledger of the bankers with whom the bankrupt firm kept cash. The entries in this book were made by various persons. One of the bankers' clerks stated that that was the book to which all the clerks of the house referred, to see whether they should pay the checks of their customers when presented; and it appeared from that ledger that at the time of A. Cope's bankruptcy, his firm had nothing remaining in the banker's hands. It was objected that this book was not evidence, at all events, as against the defendant, and that the clerks who made the several entries ought to have been called. The objection, however, was overruled, and a verdict found for the plaintiff.

Upon this ground, and also on the ground that the verdict was contrary to evidence, and did not sustain the promises as laid in the declaration,

*Wilde*, Serjt., moved for a new trial; against which

*Merewether*, Serjt., showed cause.

It appearing that the evidence was not very clear, the Court pronounced no decision on the objection to the declaration, but granted a new trial, in order that the question might be more distinctly raised. Upon the subject of the banker's ledger, however,

*Best*, C. J., said, that it was properly received in evidence, and that great mischief would ensue if the Court were to hold otherwise. The inconvenience of calling all the clerks of the house would be seriously felt, and without the book it would be impossible to prove that the party had no money in the house. To prove the negative, therefore, the book, to which all referred, was sufficient, although it might not be admissible to prove the affirmative.

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**(IN THE EXCHEQUER CHAMBER.)**

**THORPE v. COOPER. — p. 116.**

Where commissioners under an enclosure act of 1709, were to make allotments to persons possessing interests in the contiguous townships A., B., and C., and made allot

ments to a rector, in B. and C. in respect of tithes and glebe to which he was entitled in B. and C., and in A. in respect of glebe to which he was entitled in A., but omitted to make any specific allotment in A. in respect of tithes to which he was entitled in A.; the act containing a saving clause for all persons other than those to whom allotments or compensations should be made in respect of their several interests: Held, that the rector was not barred from suing for his tithes in A., in 1825, although the award was to be final unless appealed against in six months.

**ERROR** from the King's Bench on a bill of exceptions, by which it appeared that this was an action brought on the statute 2 & 3 Ed. 6, by the Reverend William Cooper, as rector of the parish of Waddingham, in the county of Lincoln, against Thorpe, an occupier of certain arable, meadow, and pasture lands in the parish of Waddingham, for not setting out the tithe thereon. The plaintiff, at the time of the trial of the cause, was, and since the 29th of September, 1811, had been, rector of the parish of Waddingham-cum-Snitterby. The defendant on the 29th of September, 1817, occupied certain arable, meadow, and pasture lands in the township of Waddingham, and had cut and carried away divers crops of corn, grain, and hay, grown on such lands, of the value of 4*l.* 18*s.*, without having set forth any tithes, or compounded for them. The parish of Waddingham consists of two townships, viz., Waddingham and Snitterby. Certain proceedings in Chancery in the year 1700 were given in evidence, consisting of a bill, answer, and decree. The bill set out an agreement made between the then rector of Waddingham and the owners of lands in the parish, that certain common lands should be inclosed, and that the rector should have a certain portion of the lands, and the annual sum of 94*l.*, in lieu of tithes; and this agreement was confirmed, and ordered to be performed, by the decree. The lands on which tithes were claimed by the plaintiff in this action formed no part of the lands inclosed under the above decree, but were part of the lands inclosed under an act of parliament in 1769, hereinafter mentioned. The above-mentioned composition was proved to have been paid from time to time by the occupiers of land in the township of Waddingham, and accepted by the rectors from that time until the year 1788, when a new rector, Dr J. Barker, the immediate successor of Robert Carter hereinafter mentioned succeeded; the composition of 94*l.* per annum was then abandoned, and a new composition agreed upon between the occupiers and the then rector, at a valuation of the whole parish; and such valuation had respect as well to the lands inclosed under the act of parliament hereinafter mentioned as those inclosed under the decree. The plaintiff was presented to the rectory of Waddingham in 1808, and the defendant paid his share of the composition in respect of the lands in question to the plaintiff's predecessor, and to the plaintiff, until the year 1811. From Michaelmas 1811 to Michaelmas 1812, the plaintiff took the tithes of them in kind, and from Michaelmas 1812, the defendant refused to pay any composition, or set out his tithes, in respect of the lands in question.

In the year 1769, an act of parliament, entitled "An act for dividing and inclosing certain open fields, lands, and grounds in the several townships of Atterby, Snitterby, and Waddingham, in the county of Lincoln," was passed. That act recited (inter alia) that the Reverend Robert Carter, clerk, was at that time rector of the parish and parish church of Waddingham-cum-Snitterby, and as such, was seised of certain glebe lands in the said open fields and grounds, and entitled to all the tithes great and small, ecclesiastical dues, duties, and payments arising within the titheable places of the said parish; and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of Atterby; and then enacted, that all the said open arable fields, commons, pastures, carrs, and waste grounds, or other open and com-



non grounds in the said several townships, be divided and allotted by certain commissioners appointed to carry the act into execution, and directed such commissioners to assign and allot unto and for the said Robert Carter and his successors, rectors of the said parish of Waddingham-cum-Snitterby aforesaid, such parcel or parcels of the said arable fields, common pastures, and carrs within the said township of Snitterby (except the common pasture called the Carrside), so directed to be inclosed as aforesaid, as should, in the judgment of the commissioners, or any two of them, be equal in value to and a full satisfaction for the present glebe lands of the said rector within the last-mentioned lands and grounds so to be inclosed, and then to assign and allot unto and for the said Robert Carter, and his successors as aforesaid, such parcel or parcels of the residue of the same arable fields or common pastures and carrs in Snitterby aforesaid, and also of the titheable parts of the said townships of Waddingham as should (quantity, quality, and situation considered) contain or be equal in value to two full fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full recompense and compensation for all the tithes, dues, duties, and payments whatsoever belonging to the said rector, and arising, renewing, or happening, or which might arise, renew, or happen within the same lands and grounds; and further, to assign and allot unto and for the said Robert Carter and his successors (rectors as aforesaid) such parcel or parcels of the said arable fields of Snitterby aforesaid, as by the said commissioners, or any two of them should (quantity, quality, and situation considered) be adjudged to be equal in value to the tithes of the ancient inclosed lands in Snitterby aforesaid. The act further directed allotments to be made in the Carrside pasture, equal in value to two-fifteenth parts of the titheable grounds (quantity, quality, and situation considered) to the rector of Waddingham-cum-Snitterby, and the vicar of Bishop Horton, according to their respective shares and interests in the tithes of the said Carrside pasture. It was further enacted, that within six calendar months next after the commissioners, or any two of them, should have completed the division and allotments thereby directed to be made, or as soon after as conveniently might be, they should form and draw up their award or instrument in writing, which should express distinctly and separately the quantity in statute measure of the acres, roods, and perches contained in the said fields and grounds thereby directed to be so set out and assigned; and also the situation, abutments, and boundaries of each and every the respective townships of Atterby, Snitterby, and Waddingham, and should contain orders and directions as to the repair of the fences, ditches, gaps, stiles, and bridges; and also all such other orders, regulations, and determinations as should be necessary or proper to be inserted in the said award conformable to the tenor and purport of the said act; or for the completing and maintaining of the said division and enclosure; and that the said award should within six calendar months after the execution thereof be enrolled by the clerk of the peace of the division of Linsey, in the county of Lincoln; and that the several allotments and divisions, and all orders, directions, regulations, and determinations so to be made as aforesaid, and declared in and by the said award, should be binding and conclusive unto and upon all the parties interested; and that immediately after the enrolment of the said award, all manner of tithes, ecclesiastical dues, duties, and payments of what nature or kind soever, arising, renewing, increasing, payable, or happening within or out of the lands or grounds thereby directed to be inclosed, or within the said ancient inclosed lands or grounds, or otherwise howsoever (except such surplice fees or other payments as were before excepted), and all right of common, right of stray, and right of average upon the said lands and grounds thereby directed to be

inclosed, and every of them, should cease and for ever be extinguished. An appeal to the quarter sessions of the peace was given to any person who might think himself aggrieved by anything done in pursuance of the act, the appeal to be within six calendar months after the cause of complaint, other than and except such orders and determinations of the commissioners as in the act were declared to be final and conclusive. And the justices were required to hear and determine the matter of such appeal; the determination of the said justices was to be final and conclusive to all parties concerned, and not to be removed by certiorari or other process whatsoever into any of the courts of Westminster. The act contained the following saving clause: "Saving always to the King's most excellent Majesty, his heirs and successors, and to all and every person and persons, bodies politic and corporate, his, her, or their heirs, successors, executors, and administrators, other than and except the respective persons to whom any allotment of land or compensation shall be made by virtue of this act in respect of the interest or property for which such allotment or compensation shall be made, all such estate or interest as they, every, or any of them had and enjoyed, of, in, to, or in respect of the said fields, common pastures, carrs, and waste grounds, or any of them, before the passing of this act, or could or might have had or enjoyed in case the same had not been made; but no such other person or persons, bodies politic or corporate, his, her, or their heirs, executors, administrators, or successors, shall have power to disturb any of the allotments to be made in pursuance of the act, but shall accept their respective allotments which shall be made in lieu of the lands, common rights, tithes, or other interests, which he, she, or they would have been entitled to in case this act had not been made."

The commissioners appointed by the act duly proceeded to make a division and allotment of the several lands and grounds thereby directed to be divided and inclosed; and on the 29th of November, 1770, duly made and executed their award in writing concerning the same, which award was duly enrolled according to the provisions of the act. By this award the commissioners assigned unto Robert Carter and his successors for the time being, rectors of Waddingham-cum-Snitterby, as follows:—Three several lots or parcels of ground, containing together 51 acres, 1 rood, 30 perches, statute measure, which they declared to be in lieu of and as a compensation for all the said Robert Carter's ancient glebe lands and rights of common in the North Carr, South Carr, and Carrside pasture, and the ace field in Waddingham aforesaid. These allotments were figured in the margin of the award under the head of "Waddingham allotments," "Glebe allotment." At the conclusion of the Waddingham allotments, on the sixteenth sheet of the award, there was a marginal note by the commissioners, viz., "Here end the Waddingham allotments." And immediately after was the following marginal note, viz., "Snitterby allotments begin here." In the sixteenth sheet of the award, in the margin, under the head "Snitterby allotments, allotment to the rector in lieu of glebe," the commissioners assigned to the said Robert Carter, as rector of Waddingham-cum-Snitterby, two several plots or parcels of ground, containing together 33 acres, 3 roods, 32 perches, and which they declared to be in lieu of the glebe lands, and right of common belonging to the said Robert Carter, as rector aforesaid; and also in lieu of an ancient inclosure or piece of glebe land given by him in exchange to John Richardson. The commissioners then assigned to the said Robert Carter, as rector of Waddingham-cum-Snitterby, five several plots or parcels of ground, containing together 223 acres, 1 rood, 31 perches, which (quantity, quality, and situation considered) they adjudged to be in lieu of, and as a full recompense and compensation for all the tithes, dues, duties,

and payments belonging to the said Robert Carter, as rector aforesaid, within the open fields, common pasture, and carrs in the township of Snitterby and Atterby aforesaid. The commissioners also assigned unto the said Robert Carter and his successors, rectors of Waddingham-cum-Snitterby, one plot or parcel of ground, containing 17 acres, 2 roods, statute measure, which (quantity, quality, and situation considered) they adjudged to be equal in value to the tithes of the ancient inclosed lands in Snitterby. At the end of the Snitterby allotments was a marginal note by the commissioners as follows; viz., "Here end Snitterby allotments." The commissioners then assigned unto the Reverend George Jolland and his successors for the time being, rectors of Atterby aforesaid, a certain allotment in lieu of glebe; certain allotments, amounting together to 125 acres, 3 roods, 26 perches, statute measure, which (quantity, quality, and situation considered) contained or were equal in value to two full fifteenth parts of the arable fields, common pastures, and carrs in Atterby aforesaid, and they adjudged the same to be in lieu of and as a compensation for all the tithes, dues, duties, and payments of the said G. Jolland within the said arable fields, common pastures, and carr grounds in the said several townships of Atterby and Snitterby, except as in the said act is excepted; and also certain allotments in lieu of tithe of old inclosure in Atterby and Snitterby aforesaid.

The lands allotted in Snitterby under this act amounted to 1533 acres, 17 perches; and deducting the allotment for the glebe, 33 acres, 3 roods, 32 perches, there remain 1499 acres, 25 perches; two fifteenths of which would be 199 acres, 3 roods, 32 perches.

The lands allotted as aforesaid to the rector in Snitterby amounted to 223 acres, 1 rood, 31 perches, leaving an excess of 23 acres, 2 roods, 9 perches, above the 199 acres, 3 roods, 32 perches.

The lands allotted in the township of Waddingham under the act amounted to 1281 acres, 1 rood, 36 perches; and deducting the allotment for glebe and rector's right of common, 51 acres, 1 rood, 30 perches, and for a gravel pit, 1 acre, 2 roods, there remained of lands in that township 1228 acres, 2 roods, 6 perches; two fifteenths of which would be 163 acres, 3 roods, 8 perches.

The lands allotted in the township of Atterby under the act amounted to 846 acres, 3 roods, 28 perches; and deducting the allotment for glebe, 13 acres, there remained of lands in that township 833 acres, 3 roods, 28 perches; two fifteenths of which would be 111 acres, 29 perches. The lands allotted to the rector amounted to 125 acres, 3 roods, 26 perches, leaving an excess of 14 acres, 2 roods, 37 perches, beyond the 111 acres, 29 perches.

There were 888 acres, 16 perches, allotted to proprietors of lands in Waddingham having no allotments made to them in Snitterby.

There was not in the award any order, direction, regulation, or determination of the commissioners, as to the tithes of the lands in the township of Waddingham inclosed by virtue of the act or any part thereof, unless anything above stated amounted thereto.

One of the plaintiff's witnesses in his cross-examination stated that the land which the rector of Waddingham-cum-Snitterby had was of good fair quality, and lay together convenient. He got forty acres of carr land, much better than the uninclosed land which had not been mowed for seven years.

*Broderick* for the plaintiff in error. It cannot be disputed that the legislature intended the rector to have an allotment in lieu of his tithes in Waddingham; but it must be taken upon this award, that he has received such an allotment, although in express terms lands in Waddingham have not been awarded in lieu of the tithes there. By the act the commissioners were

empowered to allot such parcels of the arable fields and common pastures of the township of Snitterby, and of the township of Waddingham, as should (quantity, quality and situation considered) be equal to two fifteenth parts of the titheable parts of those lands. Now, provided the rector obtained his two fifteenths of both townships, it must have been immaterial to him whether the allotment comprising the two fifteenth were placed in Snitterby or in Waddingham; and deficiency in quantity may have been compensated for in quality. If that might be legally done, it may be fairly presumed that it was done, for otherwise it is difficult to account for the surplus quantity of 23 acres of land allotted to the rector in Snitterby; at all events, the rector having acquiesced in the award for such a length of time, every intendment ought to be made in favour of it. And if he has had any allotment in lieu of the tithes in Waddingham, he comes within the exception in the saving clause, and is barred.

*Adams*, Serjt., for the defendant in error. The commissioners were bound by the act to allot to the rector of Waddingham lands in Waddingham, in lieu of his tithes in Waddingham. The act directs them to allot to the rector such parcel or parcels of the arable fields, common pastures, and carrs, within the township of Snitterby, and also the titheable parts of the township of Waddingham so directed to be inclosed, as should (quantity, quality, and situation considered) be equal in value to two full fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full compensation for all the tithes belonging to the rector, and arising within the *same* lands and grounds. The commissioners were, therefore, to make to the rector such an allotment of the lands in Snitterby, and of the titheable parts in the township of Waddingham, as should be equal to two fifteenth parts of the titheable parts in Snitterby, and to two fifteenth parts of the titheable parts in the township of Waddingham. But they have omitted to make any allotment to the rector in lieu of his tithes in the township of Waddingham. The allotment of land in lieu of tithes in Snitterby and Atterby cannot be intended to include a compensation for the tithes in Waddingham, for the commissioners had no power under the act of parliament to allot land in Snitterby or Atterby, as a compensation for the tithes in Waddingham. Eight hundred acres having been allotted to persons in Waddingham, who have no allotments in Snitterby, the rector has received neither tithe nor allotment in respect of their lands. If the allotment in Snitterby was to be a compensation for all the tithes, it should have consisted of 264 acres, whereas it consists only of 223 acres; and it is stated that the quality was not superior. Then, assuming that the rector has no allotment in lieu of his tithes in Waddingham, his right is not barred by the act of parliament. It is true, that in *Cooper v. Thorpe*, 1 Swanst. 22, the Master of the Rolls was of opinion that the rector was barred; but it appears from the report of that case, that the saving clause in the act of parliament was not adverted to. By that clause the rights of all persons are saved, "other than and except the respective persons to whom any allotment of land or compensation shall be made by virtue of that act, in respect of the interest or property for which such allotments or compensations should be made." Now by the award the rector has not had any allotment or compensation in respect of his estate and interest in the tithes of Waddingham. His right, therefore, is saved, and, consequently, the act of parliament is no bar to this action.

*Cur. adv. vult.*

BEST, C. J. Any compensation for the tithes of Waddingham, however inadequate, would extinguish the right of the defendant in error, because the amount of compensation was to be decided by the commissioners. If

the commissioners had erred by giving too little, their errors could only be corrected by an appeal; and the rector for the time being not having appealed to the sessions, his claim, and that of his successor, would have been for ever barred. But the record states, "that there is not in the award any order, direction, regulation, or determination of the commissioners as to the tithes of lands in the township of Waddingham inclosed by virtue of the act, or any part thereof, unless anything above stated amounts thereto." It is clear that nothing previously stated amounts to an award of compensation for any of the tithes of Waddingham, for all the allotments are made as compensation for other claims which are stated in the award.

This is an answer to the argument that the commissioners, considering the *situation, quantity, and quality of the land allotted to the rector*, might think his allotment a full compensation for all the rights belonging to his rectory.

We have been asked to presume that the commissioners must have awarded compensation for these tithes, from the length of time that has elapsed during which no tithes have been claimed for the lands in Waddingham.

This presumption is repelled by the express terms of the award. It is perfectly clear that if a claim for compensation for the tithes of Waddingham was made to the commissioners, such claim was disallowed.

The authority the act gives to the commissioners is to *assign and allot to the rector such parcels of lands as they should consider to be a full satisfaction of his different rights*. All the rights to be compensated are enumerated. The commissioners are not authorized to decide what rights are to be compensated, but only to ascertain the amount of compensation for the rights specified in the act. With regard to the tithes of Waddingham, the legislature has not permitted the commissioners to judge what compensation shall be made for them. The statute says the compensation for these tithes shall be two fifteenths of the titheable lands in Waddingham, and the commissioners have only to ascertain what, *quality, quantity, and situation* considered, amounts to two fifteenths of the titheable lands in this township.

The commissioners not having made any compensation for the tithes of Waddingham, must either have resisted a claim which they were directed to compensate, or from inadvertence have omitted to make compensation for it. Either they have exceeded their authority in the award, or they have omitted to do what they were expressly required to do. In either view of the case their award is void, as to all such interests as are affected by their exceeding their jurisdiction, or by their omission. A party is not concluded by not appealing against a nullity.

It is probable that the allotments made to the several owners of titheable lands in Waddingham are made in the same proportions as they would have been if an allotment had been made to the rector for tithes. The owner of each allotment has the land which should have been awarded to the rector for the tithes of his allotment. If so, the only effect of this decision will be, that the rector, who has not been compensated for his tithes, will have the tithes, and the land-owners, who are to pay the tithes, will have amongst them the lands which should have been allotted to the rector as a compensation for his tithes.

But it has been insisted that, after the enrolment of the award, all tithes shall cease and be extinguished.

If there were no other clause in the act to control the terms of this section, it could not by any legal construction be made to extinguish tithes in a township of the parish of which no notice is taken. As to the tithes of that township it is no award. But there is a clause which saves the rights

of all persons, except such persons to whom compensation shall be made in respect of the interest or property for which such compensation shall be made. If any man has any interest or property for which no compensation is made, his interest is reserved to him in the same state in which it was before the act passed. It cannot be argued, that because the rector has compensation for one part of his rectory, his right in another part of his rectory, for which it is clear that nothing has been allotted to him, shall not be protected by this clause.

The clauses are consistent with each other, and effect must be given to both. Where any compensation is made, and the party does not appeal, he cannot afterwards complain of the inadequacy of the compensation, and his rights are extinguished by the first clause. If property be omitted out of the award, it is not touched by the first clause, and the rights of the owner are saved by the second. This we should be bound to hold even if our decision produced injustice: for we cannot reject a clause in the act which is reconcilable with the other parts of it. But the decision which we are called on to pronounce accords with the justice of the case to be decided.

The rector ought not to be deprived of tithes for the giving up of which he has had no compensation. Awards made under acts of parliament are governed by the same rules as apply to awards made on the submissions of individuals: a private act is regarded only as the deed of the parties bound by it: and when such an act appoints arbitrators, it is the submission of these parties. If an award goes beyond the submission to the arbitrators, it is *pro tanto* void. If it omits to decide on anything within the scope of the submission, the interest of the parties remains in the state it was in before the award was made. In *Ravee v. Farmer*, 4 T. R. 146, the reference was, "of all matters in difference." It was held by the Court of King's Bench that the parties might after an award was made on this submission, show that there were matters which, not being brought under the consideration of the arbitrators, were not decided by them, and were therefore not affected by the award. Indeed this rule is not confined to awards, for although a declaration contains counts under which the plaintiff's whole demand might be recovered, yet if no attempt has been made to give evidence of some of the claims, they may be recovered in another action. This was decided in *Seddon v. Tutop*, 6 T. R. 607; and that decision has been confirmed by subsequent cases in the King's Bench and Common Pleas. Upon these principles the defendant in error is entitled to maintain his action for not setting out the tithes of Waddingham, and the judgment of the Court of King's Bench must be affirmed.

Judgment affirmed accordingly.

JACOBS, Assignee of LAWTON, a Bankrupt, v. LATOUR and MESSER. — p. 130.

A party, who, having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises.

Quere, Whether a trainer of race-horses has a lien on the horses for his services in training.

TROVER for the conversion of certain race-horses.

At the trial, before *Burrough*, J., last Hertford assizes, it appeared that these horses had been placed by Lawton with the defendant Messer, a trainer, and were by him kept and trained for running. Lawton being indebted to Messer for his services in this respect, and for the keep of the horses, and being insolvent, Messer obtained a judgment against him, on the 5th of May, 1827, for 227*l.*, upon which he issued a fi. fa. on the 16th of the same month, returnable on the 23d. The levy was made on the 16th, and under it the horses in question, which had never been out of his possession, were sold to Messer for 156*l.*

On the 22d of May, 1827, a commission of bankrupt having issued against Lawton, upon an act of bankruptcy committed in February, 1825, the plaintiff, as his assignee, brought this action to recover the value of the before-mentioned horses.

It was contended, on the part of the defendants, that if the execution would not avail against the commission of bankrupt, at all events the defendant Messer had a lien for his services in training the horses, which entitled him to keep them till his account was settled; a verdict, however, was found for the plaintiff, with leave for the defendants to move to set it aside on this ground, and enter a nonsuit instead. Accordingly *Wilde*, Serjt., obtained a rule nisi to this effect, citing *Chase v. Wetmore*, 5 M. & S. 180.

*Andrews*, Serjt., showed cause. In *Chase v. Westmore*, the defendant, a miller, had a lien by the general usage of trade, and it was only decided, that an agreement as to the terms of grinding would not deprive him of that lien. But a mere livery-stable keeper,—and the vocation of a trainer is in effect the same,—has no lien by the usage of trade; such a lien being incompatible with the object for which horses are placed with him, namely, that the owner shall have them in condition to ride when he pleases. In *Chapman v. Allen*, Cro. Car. 271, it was decided that one who takes in cattle to agist has no lien for the amount of their feed; and in *Jones v. Pearl*, 1 Str. 556, that an innkeeper cannot sell a horse for his keep. At all events if the defendant had a lien, he waived it by taking the horses under an execution.

*Wilde*. Even admitting that a livery-stable keeper has no lien, it does not follow that a trainer is also deprived of that right. The training is an application of skill by which the value of the animal is increased; and he is not placed in the trainer's hands for the purpose of daily use, but of occasionally running at races: the trainer's claim to lien, therefore, rests upon the same footing as that of any artificer who bestows his labour upon goods; and it was not waived in the present case, because, notwithstanding the execution, the horses were never out of the defendant's possession. *Curr. adv. vult.*

BEST, C. J. This was an action of trover against a stable keeper and trainer, to recover the value of certain horses placed with him for the purpose of being trained. The first question in the cause is, Whether the defendant had any lien on the horses; and the second, Whether, if he had

a lien, it was destroyed by his taking the horses in execution. It is not necessary for us to enter on the first question, because we are of opinion that if he had any lien, it was destroyed by the execution at his suit.

A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But Messer himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Messer, and with his assent, Messer's subsequent possession must have been acquired under the sale, and not by virtue of his lien.

As between debtor and creditor the doctrine of lien is so equitable that it cannot be favored too much; but as between one class of creditors and another there is not the same reason for favor.

Rule discharged.

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COLLINS v. PRICE. — p. 132.

A child at school, for whom payment had been made quarterly, was sent home for illness four days after the commencement of a quarter, and did not return: Held, that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice or a quarter's pay, and although the school was a day-school, at which the child was the only boarder.

*ASSUMPSIT*, by a schoolmaster, to recover a quarter's board for a child placed under his care by the defendant. There was a special count in the declaration, alleging an undertaking to pay for a quarter, or give a quarter's notice, in consideration of the plaintiff's instruction; and a common indebitatus count for a quarter's tuition, board, &c. Plea, non assumpsit.

At the trial, before *Best*, C. J., Middlesex sittings, it appeared that the plaintiff kept a day-school, but that the child in question had been placed with him as a boarder, and was the only boarder he had. The plaintiff's charges for the child had always been sent in and settled quarterly, up to the Midsummer holidays, 1827. Upon their expiration the child was sent to school again, but after four days was taken ill, and sent home by the plaintiff for her recovery. The defendant never sent the child back, and the plaintiff now sued to recover his charge for the whole quarter. There was a set-off proved to a greater amount than the value of the four days' board.

The jury found a verdict for the whole quarter, leave being reserved to the defendant to move to set it aside, and enter a nonsuit on the ground that there was no agreement to pay for the quarter.

*Wilde*, Serjt., having obtained a rule nisi accordingly,

*Spankie*, Serjt., showed cause. The previous payments having been quarterly, there is sufficient evidence of an implied contract to pay by the quarter, and not to take the child away without a quarter's notice or a quarter's pay; such being the usual course of dealing with schoolmasters, who do not in general undertake to teach by the day or week, but by the quarter. If the law were otherwise, they might be put to great inconvenience in providing fruitlessly for an ensuing quarter. But the plaintiff is entitled to recover on the common count; for even if there were no agreement on the subject of notice, the contract was by the quarter; and in *Gandell v. Pontigny*, 4 Campb. 375, it was holden,



that where a servant is hired by the quarter, if he be discharged by his master without sufficient cause in the middle of a quarter, he may recover the quarter's wages under a count in indebitatus assumpsit. In *Robinson v. Hindman*, 3 Esp. 235, Lord *Kenyon* held the same. So in actions for use and occupation, if the defendant has commenced a quarter, he must pay, whether he occupies the whole time or not. In *Delamainer v. Winteringham*, 4 Campb. 186, it was held, a sailor might recover for wages during an imprisonment on shore under an embargo in a foreign port.

*Wilde.* The defendant must be liable either in respect of an express or an implied contract. Express contract there is none, here ; and there is no fact in the case from which the Court can imply one ; for if such implication can be raised at all, where is the line to be drawn ? What is to exclude the implication of a contract for half a year or a year as well as a quarter ? The plaintiff's was only a day-school, and whatever may be urged with respect to the practice of boarding-schools, for day-schools there is no established rule ; or if there be any, it is, that instruction is paid for by the day or week rather than by the quarter.

If a contract by the quarter may be implied for a child's day-school, why not for a dancing or a fencing academy ? But it would be impossible to conduct such establishments, if persons who wanted but a few lessons should be held liable to pay for a quarter.

In the case of servants, the law implies a contract by a year, *Beeston v. Collyer*, 4 Bingh. 309, and by universal usage they are entitled to a month's wages or a month's warning, except in the case of misconduct. In the case of houses, the landlord may be unable to dispose of his premises if the tenant leaves them at an unfavorable time of the year ; but a schoolmaster can go on without interruption, although one of his scholars should fall sick or die.

*Cur. adv. vult.*

*PARK, J.* Although there was no express contract, the question is, Whether there was not evidence from which the jury might infer that there was an implied contract from quarter to quarter.

We do not think it necessary to assimilate this case to the sailor's wages, as in the case of *Cutter v. Powell*, 6 T. R. 320, nor to those of the wages during the Russian embargo. The former case depends upon a question, perhaps of public policy ; the latter upon the very peculiar circumstances of that transaction.

Here the former payments had been for and by the quarter. A new quarter had been begun ; no intention, no declaration of any intention, to take away the child. She is not at last taken from school by the parent ; but the child falling ill, the schoolmistress very properly sends her home.

No intention is then manifested to put an end to the contract ; no fault was attributable or attributed to the mistress, who would have continued her services, if they had been accepted ; and, therefore, the jury were well warranted in coming to the conclusion they did.

It seems, if authority were wanting, not very easy to distinguish the case of *Gandell v. Pontigny*, 4 Camp. 375, and 1 Stark. 198.

I quote from the latter. It was an action for work and labor. The plaintiff had been employed as a clerk by the defendant, in his counting-house, at a salary of 200*l.* per annum, which had been paid quarterly.

The defendant, being displeased with the plaintiff's conduct, on the 11th August, (in the midst of a quarter,) discharged him, paying him 25*l.*, the proportionate salary for half a quarter, which would expire on the 15th August. The plaintiff tendered himself the next morning at the counting-house, as ready to discharge his duty as usual, when the defendant declined his services. The Court held, that the plaintiff was entitled to recover his salary for the remainder of the quarter, on the general count for work and labor.

Rule discharged.

STROTHER and Another v. BARR and Another. (a) — p. 136.

*Quare*, Whether in an action for an injury to the reversion, proof that the premises were devised to plaintiff, and that an occupier holds as tenant to the plaintiff, the latter fact being established by oral evidence, although the occupier holds under a written agreement, be sufficient to show a reversion in the plaintiff.

*Best*, C. J., and *Burrough*, J., neg.; *Park*, J., and *Gaselee*, J., aff.

GASELEE, J. In this case, Marmaduke Strother and Hannah Strother are the plaintiffs, and Robert Barr and Lewis Morgan, defendants. This comes before the Court upon a motion to set aside the verdict, which has been obtained for the plaintiffs with 1*s.* damages, and to enter a nonsuit. This case was tried at the last assizes for the county of York by my brother *Bayley*. It was an action upon the case, for an injury to the reversion of the plaintiffs, by pulling down certain posts and foundation-stones, which supported a wooden building called Noah's Ark. The only question before us, is, Whether or not there was sufficient evidence of the plaintiffs' having a reversionary interest. The building was stated in the declaration to be partly in the possession of Joseph Ingle and William Milner.

In order to prove the plaintiffs' case, Joseph Ingle was called, and said, "I know the Noah's Ark; I occupy part. Mr. and Miss Strother, the plaintiffs, are my landlords. William Milner occupies another part." Upon cross-examination, he says, "I took the premises of Mr. and Miss Strother. I saw both often; Mr. Strother at first. I had an agreement in writing, which I signed my name to, for so much a year. I have held seven years, and have wrought out the rent every year. Milner occupies part of the building on the same floor as I do." The will of Mary Strother, devising the premises to the plaintiffs, as tenants in common, was then put in and read. William Milner, the other tenant, was called, and he says, "I pay rent for what I occupy to Mr. Strother. I do not know Miss Strother."

Upon this it was contended, that the written agreement of Joseph Ingle should be produced. (It does not appear whether there was any agreement with Milner or not.) It was objected, first, that the written agreement with Ingle should be produced, because, among other things, the quantum of the damages the plaintiffs would be entitled to recover would depend upon the length of Ingle's term; and, secondly, that Milner proved a tenancy under Mr. Strother only. The learned Judge who tried the cause, adds, "I thought it desirable to have the case decided

(a) The facts and arguments in this case are so fully developed in the judgment, that it was deemed improper to state them twice.

upon the merits, and I gave the defendant leave to move to enter a nonsuit, should the Court be of opinion I ought to have nonsuited upon the above objection." In pursuance of the leave so reserved, application has been made to this Court, and a rule was granted to show cause why a nonsuit should not be entered. That rule has been argued before the Court, and it is my duty to state my opinion first, unfortunately differing as I do from some of the others of the Court. Upon the best consideration I have been able to give this case, I am of opinion this rule ought to be discharged. I do not mean to say, contrary to principles long established, that you can give the contents of a written agreement in evidence without producing the agreement itself. If it were necessary in this case to prove the terms of the holding of the tenant, I should be of opinion the rule should be complied with, and that the tenancy could not be proved by other evidence than by producing the written agreement itself. But it appears to me not to be necessary to prove any item of the agreement. The facts to be made out are simply these: that the plaintiffs have an interest in the premises, and that the persons named in the declaration are their tenants. Now, that fact is capable of proof, and was actually proved without the intervention of any agreement or lease; without having recourse to any one item in it. And I find, so lately as the year 1827, a case was determined by the Court of King's Bench, which is so like this case, that I cannot make the smallest distinction. Without, therefore, going into all the cases which have been decided, I think it sufficient to go no further than to read an authority that appears to me to be decisive upon this case. It is the case of *The King v. The Inhabitants of the Holy Trinity and St. Margaret, Hull*, which is to be found in 1 Manning and Ryland's Rep. 444, S. C. 7 B. & C. 611; and the question was, Whether or not the plaintiff was entitled to a settlement upon a tenement of 10l. a year value. In order to prove that, the appellants were proceeding to show that the pauper was in the occupation of a tenement of that value: the respondent's counsel thereupon interposed, and asked the pauper whether the contract under which he held the tenement was not in writing; and upon his answering that it was, they objected that no parol evidence could be received upon the subject, but that the document itself must be produced, or the loss of it proved. The appellant's counsel, in reply, contended, that they were not examining as to the contents of the document, with which they had nothing to do, but all they proposed to prove, was the fact of the occupation and the rent paid by the occupier; and that they were at liberty to prove so much by the cross-examination of the pauper, without any reference to the agreement. The court of quarter sessions, however, were of opinion that the written agreement ought to be produced, or its absence accounted for; and that neither being done, the parol evidence was not admissible. The evidence consequently was rejected.

Upon a case being granted, the Court of King's Bench, after hearing counsel at some length, stopped him, and my brother *Bayley* said, "The appellants did not inquire into the terms or contents of the written agreement. They simply asked a question as to the fact, whether the pauper had or had not been tenant of the premises in a particular parish. Surely, in reply to that question, the witness ought to be allowed to say, 'I was the tenant of A.'" In giving the judgment of the Court, my brother *Bayley* says, "The contents of this written agreement could

not be proved by parol evidence, and, therefore, it was properly decided in the cases which have been cited, that where such a written agreement was in existence, the terms of the tenancy, or amount of the rent, could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence, of the fact that the relation of landlord and tenant existed between particular parties at a particular time in a particular parish. I think decidedly that proof by parol of the fact of the pauper's having been tenant was receivable, and, therefore, that the sessions were wrong."

This question was also brought before the Court of King's Bench in *The King v. Inhabitants of Castle Morton*, 3 B. & A. 588; when the Court held the agreement must be produced, and parol evidence could not be given of it. But the plaintiff in that case was not merely to prove there was the relationship of landlord and tenant; he sought to show by the agreement, which was unstamped, that the premises were of the value of 10*l.* a year, of which he offered no other evidence but the contents of the contract itself. The Court held that he ought to produce the agreement, and that he could not give parol evidence of it. Lord *Tenterden*, in giving his judgment, referring to *Dover v. Mestaer*, 5 Esp. 92, says, "The promissory note was there admitted in evidence, on the ground that the defendant, who had in that case been guilty of a crime, should not be allowed to relieve himself from the consequences of it by such an objection, (that it was unstamped.) And so in the case of forgery, a prisoner cannot object that the forged instrument when produced cannot be given in evidence for want of a proper stamp. But this case is very different; for the parties here seek to show the value of a tenement by the proof of a contract previously entered into respecting it. The contract was not, therefore, in this case collateral, but of the very essence of the case." To be sure it was, because there the mode resorted to for proving the value was to show that the pauper had contracted to give so much.

Now, in the present case, there is not one syllable of proof of what quantity of rent was to be paid. All that it was necessary to prove, was, that the plaintiffs were landlords of the persons named in the declaration, and that they were tenants; and how is that proved? The landlords' right is proved by the best of all possible evidence; they claim under the will of Mary Strother, and the will is put in and read, and by the will the plaintiffs are constituted tenants in common. What is the next fact proved? That the occupiers are tenants to the plaintiffs of the estate. That I consider would be *prima facie* evidence of a *seisin in fee*. The witness goes on to say, however, not that he is in possession merely, but, "I am in possession as tenant to the two plaintiffs, to whom I pay rent." That is all that it is necessary to inquire. The objection taken at the trial was, that there was no evidence of the value of the reversion, and, therefore, the damages could not be ascertained. If, indeed, the plaintiffs had gone for damages commensurate to their title, and wanted to prove it, they must have taken some course or other to do it; but the plaintiffs do not appear to have done that here. Probably, if they had gone for damages, they must have gone further, and have produced their agreement, that being the only means by which they could show the extent of their interest. But this is like every other case where no real damages are to

be proved. An injury was done, but the plaintiffs were content to take nominal damages. Now, was it a necessary thing to prove extent of title in this case? I apprehend not, because in the case which will most probably be relied upon as deciding this point, the Court held, that although there was no evidence of damages, the party was entitled to a shilling. I am speaking of the case of *Cotterill v. Hobby*, 4 B. & C. 465. It was an action for an injury to a reversion, by cutting down a tree. The first count stated a written agreement; and the Court held there, that it was necessary the written agreement should be produced. And why? Because there the question was, whether the trees had been demised; that could only be ascertained by the agreement itself, and the Court held the agreement should be produced. Now, as there is no question of that sort here, I do not think that case applies to the principle which is to decide this. The Court held there, that the plaintiff was entitled to recover upon his count in trover, the defendants having cut down a tree which was proved to belong to the plaintiff; but whether the plaintiff claimed it as reversioner or as occupier, or by any other title, was not the question in the action, which was trespass on the case; he was clearly entitled to the wood, in whatever character he appeared, whether as reversioner or occupier. The Court held he was entitled to recover the value of the tree, inasmuch as evidence had been given to prove his title to it.

I am of opinion this rule should be discharged.

BURROUGH, J. I am very sorry to differ from my brother *Gaselee*, but I am clearly of opinion the other way, and I will state very shortly why. The application of the rules of evidence depends very much on the nature of each particular action. Here the plaintiffs have a reversionary interest in lands which are in the possession or occupation of certain persons. But it must be recollected that the defendants are entire strangers to such interest, as they are not the tenants or occupiers, but mere wrong-doers. I admit that payment of rent is *prima facie* evidence of a reversion in the plaintiffs; but when one of those witnesses said, he was tenant to the plaintiffs, and held under an agreement, no parol evidence was receivable, as the agreement itself should have been produced. Whether the plaintiffs were entitled or not would depend on the construction of that instrument, and when produced, it might show an interest different from that of a reversionary interest. It is impossible to say what the plaintiffs' interest was, until the instrument was produced. There was no evidence, therefore, to go to the jury of any reversion, and the plaintiffs failed in the material point. As to the verdict being taken for nominal damages, that proves nothing, in my opinion. There was nothing proper to go to the jury, unless the agreement were produced; and I, therefore, should have directed a verdict for the defendant. It is the common course in trials at *Nisi Prius*, if the term a party holds, is by a contract in writing, to have the contract produced, and no other evidence can be receivable to explain its contents; and here, as the plaintiffs did not produce the agreement, they made out no case against the defendants as wrong-doers. The defendants are mere wrong-doers, and not tenants or occupiers.

On the whole, therefore, it appears to me, that the general rule of evidence, as laid down by the text-writers with respect to the admissibility of parol testimony to explain the contents of a written instrument, is particularly applicable to this case. Here the party held by a written agreement, which should have been produced, without which he proved nothing.

I am clearly of opinion, that the rule of evidence should have been complied with ; and, therefore, that the rule for a new trial must be made absolute.

PARK, J. Upon the first question I think that there was sufficient evidence to go to the jury of a tenancy by both the occupiers named in the declaration under both the plaintiffs.

The main question is, Whether, in order to prove a reversion in the plaintiffs, it was necessary to give more evidence than was given at the trial. I am of opinion it was not. Let us see what was proved. The plaintiffs had the property devised to them as tenants in common, by the will of Mary Strother, which was read. It does not state what quantum of estate they had ; but in the absence of other proof, the estate being devised to them, and rent being paid to them, it is to be presumed, till the contrary is shown, to be a tenancy in fee. The tenants could not have the fee, for that would have required a conveyance by deed, whereas this is only said to be an agreement.

But it was said by counsel at the trial, the agreement ought to have been produced, because (amongst other things) the plaintiffs, without it, could not show the amount of the damages, for they could not show the extent of their reversion, upon the duration of which their injury and damage depended. True, this is certainly so ; but what is that to the defendants ? The plaintiffs are the losers by that, and they have lost, having only got 1s. damages ; and if they had only a week's reversion, they could not have got less. This is all that it is necessary for me to say on this part of the case, and I think I am borne out by authority ; and although, no doubt, in this matter, as well as in most others, there is a contrariety of decisions, yet I am a great enemy to vacillations in judgment ; and even if there are many cases the other way, yet finding cases perhaps comparatively modern in support of my present opinion, I think it better to stand upon the later authorities.

The doctrine I wish to be understood as holding is this, that parol evidence of the contents of a written instrument cannot be given where the contract contained in such instrument is the subject of the suit ; because the terms of the agreement must depend on the written instrument.

Thus, in one of the cases, *Brewer v. Palmer*, 3 Esp. N. P. C. 213, Lord *Eldon*, then Chief Justice of this Court, where an action for the use and occupation of certain premises, which had been demised by an agreement in writing, was brought, nonsuited the plaintiff on the non-production of the writing ; and rightly, because the terms of the holding must have been proved, and they could be allowed to appear from the written agreement only.

The principle, as far as I have been able to discover it by reference to many cases, is that shortly stated by Lord *Tenterden*, in his usual neat and precise manner. "The parties seek to show the value of a tenement by the proof of a written contract previously entered into respecting it. The contract, therefore, is not collateral, but of the very essence of the case, and therefore could not be proved by parol evidence."

That was the opinion he gave in a very short, but very correct, judgment in *The King v. Inhabitants of Casle Morton*. There, a pauper, being removed, claimed a settlement by having rented a tenement of 10l. a year ; and it appeared that the renting was by virtue of a written agreement, which it was necessary in that instance to produce, inasmuch as no other evidence was adduced to show the value of the premises.

The Court held, that the written agreement should have been produced, for there the contract was not collateral, but the very essence of the case. The same rule applies to the case of *Dover v. Mestaer*, 5 Esp. 92. But, on the other hand, *Bucher v. Jarrett*, 3 Bos. & Pul. 143, seems to me to go the full length of this case. It was an action of trover for the certificate of a ship's registry, and it was held the certificate might be proved by the production of the registry from which it was copied, though no notice had been given to produce the certificate itself. Lord Alvanley, Mr. Justice Heath, Mr. Justice Rooke, and Mr. Justice Chambre gave their opinions at full length upon the case; and the judgment of Mr. Justice Chambre in particular states the point most neatly, and carries the principle to the full extent of the present case. He says, "There is an essential difference, as I conceive, between the mode of proving a very general or a very minute description of a written instrument. The rule undoubtedly is, that no evidence can be received of the contents of a written instrument, but the instrument itself. But in this case the plaintiffs declared in trover for a written instrument, describing it generally, and not referring to its contents, of which evidence could not have been received, as no notice had been given to the defendant to produce the instrument itself."

There is also the case of *How v. Hall*, 14 East, 274, which was decided upon the same principle as that which I have just mentioned. It was an action of trover for a bond. It was contended the plaintiff might give parol evidence of it to support the general description of the instrument stated in the declaration, it not being necessary in such an action to go into minute particulars of the contract by producing the instrument itself. The Chief Justice, Lord Ellenborough, and Mr. Justice Le Blanc, after entering fully into the case, held, that in the nature of things, it was not necessary that it should be so; that the case did not require the production of the instrument.

*Jolly v. Taylor*, 1 Campb. 143, was an action of assumpsit against the proprietor of a stage-coach on a promise to carry three promissory notes of 5*l.* each from Ware to London. It was objected by Mr. Serjt. Best, that before giving evidence of the contents of the notes the plaintiff must prove a notice to produce them, as promissory notes, like all written instruments, should speak for themselves, and were not to be described according to the loose recollection of witnesses. But Chief Justice Mansfield said, "A notice here appears to me to be unnecessary. I can make no distinction as to this purpose between written instruments and other articles; between trover for a promissory note and trover for a wagon and horses."

The case of *Davis v. Reynolds*, 1 Stark. 115, was an action where Cowper and Co. of London had bought of Peacock and Co., who resided in the North of England, certain flax, which had been consigned to Cowper, and landed on the defendant's wharf in London. Cowper and Co. had transmitted to Peacock their acceptance for the amount, and had sold the flax to the plaintiff, who had paid them the amount, and had taken a receipt. The bill of lading was tendered in evidence, but rejected for want of a stamp. Lord Ellenborough said, "The right of possession follows the right of property. When the goods arrived at the wharf they were delivered to the wharfinger, as the bailee, for the benefit of the persons entitled. At that time Cowper and Co. were entitled, for they had paid their accepted bill for the goods, which does

not appear to have been dishonored ; they had thereby acquired a right of property which they were competent to assign."

In *Doe, d. Sir Mark Wood, v. Morris*, 12 East, 237, it was holden that in ejectment the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving on cross-examination, that an agreement relative to the land in question was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, the contents of which the witness did not know ; no notice having been given by the defendant to produce that paper ; for though it might be an agreement relative to the land, it might not affect the matter in judgment, nor even have been made between those parties.

In the present case it was not necessary, in order to prove the reversionary interest to be in the plaintiffs, to produce an agreement with their lessee, when it was clearly proved they, the plaintiffs, held the premises as tenants in common under the will, which was read. And although the quantum of interest which each had did not appear, still there was *prima facie* evidence of a holding in fee till the contrary was shown. In *Doe, d. Sir M. Wood, v. Morris*, Lord *Ellenborough* says, "How can we say that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared that there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back ? Enough at least ought to appear to show that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received ; but it did not appear that it was an agreement between these parties, or that it was an existing agreement at this time. It might have been an agreement between the defendant and his former landlord, or it might have related to a former period of the tenancy. The witness did not profess to know any thing of the contents of the paper, only that it was an agreement relative to the lands in question. We determined a case of *Doe, d. Shearwood, v. Pearson*, similar to this, in the last term, where the rule for a new trial, which was moved on the same ground, was finally discharged."

In the case of *Stevens v. Pinney*, 2 B. Moore, 349, my learned brother *Burrough* held, that it was not necessary to produce the written agreement.

It was an action for work and labor. The plaintiff having proved the value of the work done, and closed his case, one of the defendants' witnesses swore that there was a memorandum in writing, containing an estimate of the prices at which the work was to be performed, and produced a copy in the plaintiff's hand-writing unstamped, and not signed either by him or the defendant. The learned Judge who tried the cause held, that the plaintiff was not thereby precluded from recovering on the common counts. I do not think that will apply to the present case. The case afterwards came before the Court, when the ruling of my learned brother was confirmed, and the Court certainly relied very much on the case of *Doe, d. Sir M. Wood*, and the case then mentioned of *Shearwood v. Pearson*, as supporting that opinion.

The remaining case to be mentioned is *The King v. The Inhabitants of the Holy Trinity, Hull* ; and it does seem to me to be quite impossible to distinguish the reasoning of the judgment in that case from the present.



If that case be law, and if it be a decision of a competent jurisdiction, I do not think it necessary now to go back to more remote decisions on any special deviation from the old rule. My learned brother *Bayley*, in giving judgment in that case, says "The contents of this written agreement undoubtedly could not be proved by parol, and, therefore, it was properly held in the cases which have been cited, that where such written agreement was in existence, the terms of the tenancy or the amount of the rent could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord and tenant existed between particular parties at a particular time, in a particular parish; I think decidedly, that proof by parol of the fact of the pauper's having been tenant was receivable, and, therefore, that the sessions were wrong." The other judges concurred with the judgment delivered by the learned Judge. That case I cannot distinguish from the present. There is a discrepancy between the cases on this subject, which is much to be lamented. I have only to say, that the case of *The King v. The Inhabitants of the Holy Trinity, Hull*, is certainly much posterior in point of date to that of *Cotterill v. Hobby*.

The main case, however, upon the subject, and to which I pay the most unfeigned respect, is the case of *Doc, d. Shearwood, v. Pearson*, 12 East, 239. The objection arose on the notice to quit. The son of the lessor of the plaintiff proved that he had received rent of the defendant for his mother, and the time of these receipts agreed with the time for which the notice to quit was given; but he also spoke of the time for quitting from a written agreement entered into at the time of the taking between his mother and the defendant, which he said he had lately seen in the possession of his mother, whereupon the objection arose that the agreement ought to have been produced, which was overruled by Mr. Justice *Chambre* at the trial at York, and on its afterwards coming before the Court to set aside his opinion, the rule was finally discharged. Now, where such a man as Mr. Justice *Chambre*, whose knowledge in his profession was so considerable, whose clearness of head and accuracy of understanding were well appreciated by all his contemporaries, held this opinion, and when that opinion was confirmed by Lord *Ellenborough*, Mr. Justice *Grose*, that able and consummate lawyer, Mr. Justice *Le Blanc*, and Mr. Justice *Bayley* — greatly as I lament that I differ in opinion from my Lord Chief Justice, and my brother *Burrough*, whose opinion I also greatly and highly value — if I err, I err with those respecting whom and whose authority no Judge has occasion to be ashamed. I therefore am of opinion, with my brother *Gaselee*, that the rule ought to be discharged.

BEST, C. J. Since this case was argued at the bar, it has occupied a great deal of my attention, and I have anxiously endeavored to reconcile my opinion with that of my two learned brothers, from whom I have the misfortune to differ. But I have not been able to do so.

I seldom pass a day in a *Nisi Prius* court without wishing that there had been some written statement, evidentiary of the matters in dispute. More actions have arisen perhaps from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testi

mony. Our ancestors were wise in making it a rule that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing no parol testimony can be received of its contents, unless the instrument be proved to have been lost. It is assumed the case before us is not within this rule, and that the plaintiffs did not give parol evidence of the contents of the lease of the premises, for the injury for which this action was brought. This will be found to be a mistake; for the declaration states that the plaintiffs had let these premises to certain tenants, and that the conduct of the defendants is injurious to the reversion which the plaintiffs have in them. This statement must be proved; and is not the lease, which states all the circumstances of the tenancy, the best evidence of them?

If there had been no contract in writing, the testimony of the tenants that they occupied the premises injured by the defendants, and that they paid the plaintiffs rent for these premises, would have proved the declaration; such testimony would in that case have established the relationship of landlord and tenant, and have shown that the plaintiffs must have had a reversion at the expiration of the regular notice to quit, or, at the furthest, at the expiration of three years; that being the longest period for which a parol lease could, by the statute of frauds, be granted. But as there was a lease or agreement in writing, that lease or agreement was better evidence of the relationship of landlord and tenant than any parol evidence that could be adduced.

This lease or agreement gave a description of the premises demised, and stated the names of the tenants to whom they had been leased, the persons by whom, and the term for which they were demised.

These parts of the contract could be seen by its production only, and, therefore, the contract was the best, and, I think, the only evidence that could be received. But there is one fact that cannot be inferred from the facts proved in the case, and can only be obtained from the production of the lease or contract; namely, the duration of the term. It has been said at the bar, that the plaintiffs were content to take nominal damages, and it was not material to show when the estate which was injured was to return into their possession. But it does not appear from the evidence, that they had any reversion. This estate might be granted for one thousand years; might be the assignment of a term with a covenant by the assignee to pay rent. If the plaintiffs would have no reversion for a thousand years, I doubt whether they would have such an interest as to maintain an action for an injury to so remote a reversion. To support an action of this sort, there must be some damage, and it is impossible to prove any damage in the case I have stated. The objection, however, on which I rest my opinion is this, that matters which are stated in the lease, have been proved by parol testimony.

It cannot be denied that the lease must have been produced to prove the amount of rent, if it were necessary to ascertain it.

The lease also states the landlord's and tenant's names, and describes the premises, and the term. If the lease must be produced to prove the rent it must, for the same reasons, be produced to prove these other facts.

Lord *Mansfield*, speaking many years ago against subtilties and refinements being introduced into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says, these should be got rid of: no additions should be made to them: our jurisprudence should be bottomed on plain, broad principles, such as not only judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to proceed to more fixed rules.

If plain, intelligible rules are more necessary in one part of our law than another, the necessity exists most strongly in the law of evidence. The law of evidence is the same in actions for injuries to the reversion as in high treason; and one of the most learned writers upon the spirit of the laws of England has said, that uncertainty in the law of high treason would prevent any state from being free. This was the opinion of our ancestors, who, in Edward the Third's time, crushed, by one statute, all the subtilties and uncertainties that had been introduced into our laws. The relaxing the rules of evidence is more dangerous in the administration of justice, than all the constructive treasons that ever were invented. Suppose it to be proved, under an indictment for treason, that arms and treasonable papers are found in a house. To prove that that house was in the occupation of one of the prisoners, the landlord is called, who says that the prisoner took the house of him, and paid him rent; upon this the witness is asked, if he did not let his house by a lease in writing, and he answers in the affirmative; and suppose an objection is made for the prisoner that the written instrument is the best evidence to show who was the tenant of the house; the Judge answers, if you wish to prove the contents of the lease, you must produce it, but the prosecutors only want to show that the prisoner was tenant, and although the lease would certainly show that, yet the tenancy of the prisoner may be proved by the payment of rent. A gunsmith from Birmingham proves the prisoner was the person who bought the arms of him, and that he sent them to his house, and that a person who appeared to be the tenant of the house, and resembled the prisoner, paid for them. He is asked if the order for the arms was not in writing, and if he ever saw the prisoner before, unless the person who paid for the arms was the prisoner; he is asked whether the prisoner was the person who paid for the arms; but he cannot swear to his identity. Then an objection is made, that the order should be produced, and proved to be in the hand-writing of the prisoner. The judge says, as he must do, these arms are sent to a house of which the prisoner is tenant; they are proved to be paid for at the time by a person who appeared to be the occupier, and who resembles the man at the bar; the judge adds, that this is evidence from which the jury may infer that the prisoner was the person who bought the arms. The prisoner is convicted; and on further inquiry the lease and letter to the Birmingham manufacturer are produced, and it appears by the lease, that the house was let to the prisoner's brother, who strongly resembled the prisoner, and the letter to the Birmingham manufacturer of arms is written by that brother in his own name, and not in the name of the prisoner. Would any judge venture to advise the king to execute a prisoner under such cir

cumstances? The government are placed in this dilemma by receiving evidence like that on which the plaintiffs' case rests. Notwithstanding the difference that there is between the importance of the inquiry in the criminal and the civil courts, the rules of evidence are the same in both. I should not hesitate on principle alone, unsupported by any previous determination, to say that you cannot prove any of the contents of a lease or contract, but by the lease or contract: the contract must be shown.

The rule of law relative to the proof of the contents of written instruments is laid down with great clearness by Lord *Tenterden* in the House of Lords, in the Queen's case, 2 B. & B. 286: "The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and that alone, if the paper be in existence." Let us see how this principle has been acted upon in the cases which have come before the Court. In *Hodges v. Drakeford*, 1 N. R. 271, it was proved by a witness that the defendant had advertised his shop to be let, and that the advertisement stated that the consumption of the shop amounted to fifteen sacks of flour per week: some witness proved that the defendant said that the shop did business to the extent stated in the advertisement, and that there was an agreement in writing. The Court held, that as the agreement on which the action was brought was in writing, the plaintiff could not make out his case without producing that agreement. *Brewer v. Palmer* is but a *Nisi Prius* case; but it was decided by one of the most eminent Judges that ever sat in Westminster Hall, and is quoted with approbation by every writer on the law of evidence. It was confirmed afterwards in banco, and has been subsequently acted upon. That was an action for use and occupation; there was an unstamped agreement in writing, and the plaintiff's counsel contended that he ought to be at liberty to go into evidence of the use and occupation. Lord *Eldon* held, that the plaintiffs were bound, if there was a lease, to produce it in evidence, as it might contain clauses which would prevent the plaintiff from recovering, and that therefore it ought to be produced. So, in the present case, the contract, if produced, might have shown that the plaintiffs had no right to recover in this action. The case of *Brewer v. Palmer* is confirmed by the case of *Ramsbottom v. Turner*, 2 M. & S. 434, and has always been acted on. In *Doe, d. Sir Mark Wood, v. Morris*, the landlord having proved payment of rent by the defendant, and half a year's notice to quit, a witness said there had been an agreement in writing relating to these lands, but not to the existing tenancy between the plaintiff and the defendant; and a verdict was given for the lessor of the plaintiff. Upon a motion to set it aside, Lord *Ellenborough*, in giving judgment, makes use of these words: "How can we say that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared there was other and better evidence of it in an agreement?" Lord *Ellenborough* in that case recognizes the principle that the best evidence of a tenancy is the agreement; but in that case there was no proof, as there is in this, that there was any agreement applicable to the existing tenancy. If Lord *Ellenborough* and the Court of King's Bench had been called on to decide this case, instead of the one which was before them, in which it did not appear that the agreement related to the existing tenancy, they must, to have been consistent, have decided that in this case the agreement relating to the existing tenancy ought to be produced.

'The case of *Cotterill v. Hobby* is, in my opinion, also decisive on the point. The declaration stated, that at the time of the grievance complained of, a certain close, situate, &c., was in the possession and occupation of one H. C. Morgan as tenant thereof to the plaintiff. It was an action for an injury to the reversion, the defendant having cut down a quantity of branches from certain trees then standing and growing in and upon the said close. There was a second count in trover for the timber. Plea, the general issue. At the trial, before *Garrow, B.*, Morgan was called as a witness for the plaintiff, and proved that he was tenant to the plaintiff of the close in question under a written agreement; that defendants lopped some branches off the trees growing there, and carried them away. No evidence of the value was given. For the defendant, it was objected, that the agreement under which Morgan held should have been produced, for that it could not otherwise appear that the plaintiff was reversioner of the trees. My brother *Bayley* in giving the judgment of the Court says, "It having been shown that Morgan held under a written agreement, I am of opinion that the terms of holding could only be proved by that instrument, and, consequently, that the verdict on the first count cannot be sustained." I cannot distinguish that case from the present. It appears to me that case is supported by principle; it is supported by a variety of previous authorities, which can be traced back to remote periods. There is a series of decisions, one following the other, each agreeing with the other, all recognizing the general rule upon which I put this case; but unfortunately they are inconsistent with the one I am now coming to, which was decided by my brother *Bayley*, and is at variance with his other decision. The last case upon the subject is *The King v. The Inhabitants of the Holy Trinity, Hull*, which was decided by the three Judges of the King's Bench, and they held that parol evidence of a pauper having been tenant was admissible, although the pauper held under a written agreement. There is a variance between this case and the last preceding case, where it was decided by the same Court, that parol evidence of a tenancy was not admissible, if a written agreement existed. During the argument, Mr. Justice *Bayley* is reported to have said, the appellants did not inquire into the terms of the contract or written agreement, but whether the pauper had or had not been tenant of the premises. Surely this was inquiring into the contents of the written agreement, which ought to have been produced, as it would describe the tenancy between the parties, and the premises in respect of which they were inquiring. The same learned Judge says, "The terms of the tenancy and the amount of the rent could only be proved by the production of the agreement. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord and tenant existed between particular parties at a particular time, in a particular parish." The learned Judge admits, that you cannot prove the amount of rent by parol evidence; that the agreement is the best evidence of this. Is it not equally the best evidence of who were the parties to it, and for what time the relation of landlord and tenant continued? These are the contents of the agreement, as much as the amount of rent. There is more probability of mistake in the statement of these facts than in the statement of the amount of rent. These are complicated facts, as to which the most accurate witness may be mistaken; as to the amount of rent, he cannot mistake if he pays it

often. Parol evidence of the amount of rent, therefore, is excluded, not because amount is difficult of proof, but because parol evidence is not the best proof. It is equally not the best proof of every other fact stated in the contract. I cannot agree to a decision, much as I respect the learned Judges who decided it, which is at variance with the case before decided by the same Judges; in which distinctions are made between things which admit of no real distinction; which is inconsistent with every other case in the books; and tends to fritter away a rule of evidence essential to the security of property, of character, and of life. The learned Judge who tried this case must have doubted the propriety of the decision in *The King v. The Inhabitants of the Holy Trinity, Hull*, or he would not have reserved this point; for it is not the practice of Judges, where a question has been decided, and they subscribe to the doctrine of the decision, to reserve the point for the opinion of the Court. I think the rule for a nonsuit should be made absolute; but two learned Judges differing from the others, and the Court being equally divided, this rule falls to the ground.

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MARTIN, Demandant; BAXTER, Tenant; GRUBB and Wife,  
Vouchees. — p. 160.

1. In taxing the costs upon a mortgage transaction, the mortgagee is not allowed the expense of a declaration of trust from him to a cestui que trust who lends the money.
2. The assignment of a mortgage must have an ad valorem stamp, if it be accompanied with any new security, or any additional sum be advanced.

In this recovery, which had been suffered for the purpose of perfecting a mortgage security, the mortgagor having disputed his attorney's bill of costs, the prothonotary, upon taxation, allowed 6*l.* 6*s.* 8*d.* for the expense of a declaration of trust from the mortgagees to a cestui que trust, whose money they were lending to the mortgagor. This cestui que trust was the attorney who had negotiated the business, and whose bill was now disputed.

The sum advanced to the mortgagor was 2,934*l.*, secured by a deed of assignment of mortgage for 2,000*l.* from Miss Eborall to the mortgagees above mentioned, and by a deed which was in part an additional security for this 2,000*l.*, charging real estates of the mortgagor, other than those comprised in the deed of assignment, with the payment to the above mentioned mortgagees of the sum which they had advanced to pay off the 2,000*l.*

The assignment was charged with an ad valorem stamp duty of 6*l.*, and the other deed with a duty of 2*l.*, which charges the prothonotary allowed.

The attorney's bill containing these items had been submitted to a professional person on the part of the mortgagor, but no objection had been made to them till the parties appeared before the prothonotary.

*Jones*, Serjt., obtained a rule nisi for the prothonotary to review his taxation, on the ground that these charges ought not to have been allowed. The declaration of trust was no part of the mortgagee's security, but a mere matter of convenience to the cestui que trust, and the mortgagor ought not to pay for any deed that was not essential to the security of the mortgagee.

The assignment of Miss Eborall's mortgage, being only an additional security to the present mortgagee, ought not to have had an ad valorem stamp, the 55 G. 3, c. 184, and 3 G. 4, c. 117, having exempted from such duty all additional securities given by the same mortgagor.

*Storks*, Serjt., who showed cause argued that the cestui que trust was the

real lender of the money, and the declaration of trust being essential to his security, ought to be paid for by the mortgagor. It had been the constant practice that he should do so.

With regard to the stamp. Although the 3 G. 4, c. 117, had repealed the ad valorem duties imposed on the transfer or reconveyance of any mortgage, it had not repealed the duties imposed on any deed operating as an additional security for the sum advanced; still less, if it contained security for any additional sum, or a contract between new parties.

*Wilde and Jones*, Serjts., having been heard in support of the rule,

BEST, C. J., said, that the mortgagor ought only to pay for such deeds as were necessary for the security of the mortgagee, and that, therefore, the charge for the declaration of trust ought to be disallowed. The propriety of the charge for the stamp depended on the construction of two sections of the 3 G. 4, c. 117. That act, which was passed to relieve borrowers of money from the burthen of stamps, had enacted, s. 2, that "upon any transfer, assignment, disposition, assignation, or reconveyance of any mortgage, or of any other security in the said acts, and the schedules thereto annexed, in that respect severally mentioned, or of the benefit thereof, or of the money or stock thereby secured, provided no further sum of money or stock be added to the principal money or stock already secured, there shall be paid in Great Britain a stamp-duty of one pound fifteen shillings." Under this proviso, the additional 934*l.*, which had been advanced to the mortgagor, took the case out of the operation of the statute; and the third section (by which it was enacted, that "where any deed is made as an additional or further security for any sum or sums, previously secured by any bond on which the ad valorem duty shall have been paid, such deed shall be charged only with the ordinary duty payable on deeds in general,") only applied to further securities between the same parties for the same sum.

GASELEE, J., thought that the charge for the declaration of trust ought not to be allowed; but begged to be understood as giving no opinion on the question about the stamp.

Rule absolute on the first point only.

## (HOUSE OF LORDS.)

Sir ROBERT GIFFORD, Appellant;

The Right Honorable Lord } Respondent. (a) — p. 163.  
YARBOROUGH,

Land, not suddenly derelict, but formed by alluvion of the sea, imperceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown.

BEST, C. J. My lords, the question which your lordships have proposed for the opinion of the Judges is as follows: — "A. is seised in his demesne as of fee of the manor of N., and of the demesne lands thereof, which said demesne lands were formerly bounded on one side by the sea. A certain piece of land, consisting of about 450 acres, by the slow, gradual, and imperceptible projection, alluvion subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and imperceptibly, and by imperceptible increase in long time cast up, deposited, and settled by and from flux and reflux of the tide, and waves of the sea in, upon, and

(a) The facts and arguments in this case, and the decision of the Court of King's Bench, are in 3 B. & C. 91.

against the outside and extremity of the said demesne lands hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, grown, and accrued as aforesaid, belong to the crown or to A., the owner of the said demesne lands? There is no local custom on the subject."

The Judges have desired me to say to your lordships that land gradually and imperceptibly added to the demesne lands of a manor, as stated in the introduction to your lordships' question, does not belong to the crown, but to the owner of the demesne land.

All the writers on the law of England agree in this; that as the King is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

But this right of the sovereign might, in particular places, or, under circumstances, in all places near the sea, be transferred to certain of his subjects by law. A law giving such rights may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial. Such as claim under the former must plead it, and establish their pleas by proof of the existence of such a custom from time immemorial.

General customs were in ancient times stated in the pleadings of those who claimed under them; as the custom of merchants, the customs of the realm with reference to innkeepers and carriers, and others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence; they are considered as adopted into the common law, and as such are recognized by the Judges without any evidence. These are called customs, because they only apply to particular descriptions of persons, and do not affect all the subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws; as an act of parliament applicable to all merchants, or to the whole body of the clergy, is to be regarded by the Judges as a public act.

If there is a custom regulating the right of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings or proved by evidence, but will be taken notice of by the Judges as part of the common law. We think there is a custom by which land from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the King. Such a custom is reasonable as regards the rights of the King, and the subjects claiming under it; beneficial to the public; and its existence is established by satisfactory legal evidence.

There is a great difference between land formed by alluvion, and derelict land. Land formed by alluvion must become useful soil by degrees too slow to be perceived: little of what is deposited by one tide will be so permanent as not to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. But the sea frequently retires suddenly, and leaves a large space of land uncovered.

When the authorities relative to these subjects are considered, this



difference will be found to make a material distinction in the law that applies to derelict lands, and to such as are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion would be hard enough or sufficiently wide to be used beneficially by any one but the owner of the lands adjoining. As soon as alluvion lands rise above the water, the cattle from the adjoining lands will give them consistency by treading on them; and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide, the owner of the adjoining lands may render them productive. The lands which are of no use to the King will be useful to the owner of the adjoining lands, and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz., by occupation and improvement.

Locke, in a passage in his *Treatise on Government*, in which he describes the grounds of the exclusive right of property, says, "God and man's reason commanded him to subdue the earth; that is, improve it for the benefit of life, and therein lay out something upon it that was his own, his labor. He that, in obedience to that command, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.

This passage proves the reasonableness of the custom that assigns lands gained by alluvion to the owner of the lands adjoining.

The reasonableness is further proved by this, that the land so gained is a compensation for the expense of embankment, and for losses which frequently happen from inundation to the owners of lands near the sea.

This custom is beneficial to the public. Much land, which would remain for years, perhaps forever, barren, is in consequence of this custom rendered productive as soon as it is formed. Although the sea is gradually and imperceptibly forced back, the land formed by alluvion will become of a size proper for cultivation and use; but in the mean time the owner of the adjoining lands will have acquired a title to it by improving it.

The original deposit constitutes not a tenth part of its value; the other nine tenths are created by the labor of the person who has occupied it; and, in the words of Locke, the fruits of his labor cannot, without injury, be taken from him.

The existence of this custom is established by legal evidence. In Bracton, book 2, cap. 2, there is this passage: "*Item, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum; et per alluvionem adjeci dicitur quod ita paulatim adjicitur quod intelligere non possis quo momento temporis adjiciatur. Si autem non sit latens incrementum, contrarium erit.*"

In a treatise which is published as the work of Lord Hale, treating of this passage, it is said, "that Bracton follows in this the civil law writers; and yet even according to this the common law doth regularly hold between parties. But it is doubtful in case of an arm of the sea." (a) It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the *Institute*, lib. 2, tit 1, s. 20. But Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and

(a) Hale *de jure Maris*, p. 28.

customs. Lord Hale admits that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why the same question between the crown and a subject should not be decided by the same rule. Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry the Third, gives great authority to his writings. Lord Hale, in his *History of the Common Law*, (cap. 7,) says, that it was much improved in the time of Bracton. This improvement was made by incorporating much of the civil law with the common law.

We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamor raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these and all the Norman customs which followed would not have been sufficient to form a system of law sufficient for the state of society in the times of Henry the Third. Both courts of justice and law writers were obliged to adopt such of the rules of the digest as were not inconsistent with our principles of jurisprudence. Wherever Bracton got his law from, Lord Chief Baron Parker, in *Fortescue*, 408, says, "As to the authority of Bracton, to be sure many things are now altered, but there is no color to say it was not law at that time. There are many things that have never been altered, and are now law." The laws must change with the state of things to which they relate; but according to Chief Baron Parker, the rules to be found in Bracton are good now in all cases to which those rules are applicable. But the authority of Bracton has been confirmed by modern writers, and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down is to be found in 2 Roll's *Abr.* 170; in *Com. Dig.* tit. *Prerogative*, (D. 61;) in *Callis*, (*Broderip's* edition,) p. 51; and in 2 *Blac. Com.* 261.

In the case of the Abbot of Peterborough, *Hale de jure Maris*, p. 29, it was holden, "quod, secundum consuetudinem patriæ, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costeræ maris adjacentes projecta." In the treatise of Lord Hale it is said, "Here is custom laid, and he relies not barely on the case without it." But it is a general, and not a local custom, applicable to all lands near the sea, and not to lands within any particular district. The pleadings do not state the lands to be within any district, and such a statement would have been necessary if the custom pleaded were local. The *consuetudo patriæ* means the custom of all parts of the country to which it can be applied; that is, in the present case, all such parts as adjoin the sea.

The case of *The King v. Oldsworth* (a) confirms that of the Abbot of Peterborough as to the right of the owner of the adjoining lands to such lands as were "secundum majus et minus propè tenementa sua projecta." (b) That case was decided against the owner, because he also claimed derelict lands against the crown.

Here it will be observed that there is a distinction made between lands derelict and lands formed by alluvion; which distinction, I think, is founded on the principle that I have ventured to lay down, namely

(a) *Hale de jure Maris*, p. 14.

(b) *Id.* p. 29.

that alluvion must be gradual and imperceptible, but the dereliction of land by the sea is frequently sudden, leaving at once large tracts of its bottom uncovered, dry, and fit for the ordinary purposes for which land is used. But still what was decided in this case is directly applicable to the question proposed to us. The Judges are, therefore, warranted by justice, by public policy, by the opinions of learned writers, and the authority of decided cases, in giving to your Lordships' question the answer which they have directed me to give.

My Lords, the answer to your Lordships' question is the unanimous opinion of all the Judges who heard the arguments at your Lordships' bar. For the reasons given in support of that opinion I alone am responsible. Most of my learned brothers were obliged to leave town for their respective circuits before I could write what I have now read to your Lordships. I should have spared your Lordships some trouble if I had had time to compress my thoughts; but I am now in the midst of a very heavy *Nisi Prius* sittings, and am obliged to take from the hours necessary for repose the time that I have employed in preparing this opinion. If it wants that clearness of expression which is proper for an opinion to be delivered by a Judge to this House, I hope that your Lordships will consider what I have stated as a sufficient apology for this defect.

**THE LORD CHANCELLOR.** My Lords, I beg to express my thanks to the learned Chief Justice, and to the Judges, for the attention they have paid to this subject; and I have only to add that I entirely concur in the conclusion at which they have arrived; and I would recommend to your Lordships, as a necessary consequence of the opinion which has been expressed, that the judgment of the Court of King's Bench upon the matter should be affirmed.

**EARL OF ELDON.** My Lords, I heard only part of the argument, and therefore I have some difficulty in stating my opinion in this case; but having had my attention called to subjects of the same nature on former occasions, it does appear to me, I confess, after reading the finding of the jury, that the opinion of the Judges must be that which the learned Chief Justice has now expressed. I therefore concur in the opinion the Lord Chief Justice has expressed.

Judgment affirmed.

END OF TRINITY TERM.

C A S E S  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,  
AND  
OTHER COURTS,  
IN  
MICHAELMAS TERM,

In the Ninth Year of the Reign of GEORGE IV.—1828.

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GULLY and Others v. BISHOP of EXETER and DOWLING.—  
p. 171.

1. Where a bishop has omitted to present to a living lapsed to him for want of presentation within six months, a party who may present, if the bishop omits to do so, is not a competent witness for one who claims in the same right as such party.
2. A conveyance of a fourth part of an advowson in 1672, is not to be deemed voluntary, because the only pecuniary consideration expressed in the deed is twenty shillings.
3. An answer in Chancery, touching an advowson, filed by one who had been seised of the advowson, twenty years after he had conveyed it away, Held, not admissible in evidence against a party who claimed the advowson through him.

UPON the trial of this *quare impedit* (the pleadings in which see ante, vol. iv. 525, and vol. v. 42,) the defendant, who claimed through his mother, proposed to call as a witness his father, John Dowling, who was tenant by the curtesy of his mother's property. The witness, however, was excluded by *Park, J.*, who tried the cause, on the ground that he had an immediate interest in its result.

The plaintiff also offered in evidence, among other things, an answer in Chancery by R. Isaac, who, in 1672, had conveyed the property in the advowson to Lewis Stevings, under whom the plaintiff claimed. This answer had been put in, to a bill filed twenty years after that conveyance, and it did not appear whether Stevings was alive at the time of the answer; it was, therefore, rejected as inadmissible.

The defendant's main ground of objection to the plaintiff's title was, that the conveyance of the advowson from R. Isaac, in 1672, was voluntary and invalid for want of consideration, the consideration expressed in the deed being, "twenty shillings, faithful service, and other considerations."

It was left generally to the jury to decide on the nature of that transaction, as, whether it were fraudulent or not, and a verdict was found for the plaintiff at the last Exeter assizes.

*Merewether*, Serjt., now moved to set aside this verdict, on the ground that evidence had been improperly excluded, and that the jury had not been specifically directed to consider whether the conveyance of R. Isaac, in 1672, was without consideration.

John Dowling, he contended, was not interested, because, more than six months having elapsed since the vacancy, he could not sue in quare impedit, his right to present having lapsed : and the record in this case would never have been evidence against him.

With regard to the answer in Chancery, although filed after Isaac had parted with the property to which it related, yet as an admission by one who was probably responsible under his covenant for title, it ought to have been received in evidence.

Then, as to the deed of 1672, the substance of the defendant's case was, not that there had been moral fraud in the transaction, but that the deed being without consideration, was legally fraudulent as against subsequent purchasers. [*Park, J. In Doe dem. Watson v. Routledge*, Cowp. 705, Lord Mansfield said, that fraud must be proved to render a voluntary settlement void.] But in *Doe dem. Otley v. Manning*, 9 E. R. 59, a voluntary deed was holden void as against subsequent purchasers for a good consideration ; and Comyn lays it down, that a bargain and sale for divers causes and considerations, without money, is not good, nor in consideration of a marriage before had, or service done. Com. Dig. Bargain and Sale (B. 11.)

The time that had elapsed would not operate in support of the deed, because the parties having but a fourth turn, could scarcely be called on to present more than once in a century.

The jury, therefore, ought to have been directed to consider whether the deed was granted on a good consideration or not.

*Merewether* also moved to arrest the judgment, on the ground that the declaration alleged R. Isaac, under whom the plaintiff claimed, to have been seised of and to have granted the fourth part or purparty of the advowson, without alleging that there had been a previous partition by the coparceners, under one of whom he took the purparty, and that without actual partition he could not be said to be seised of a purparty ; he was seised of the whole jointly with the other parceners ; 2 Inst. 365.

Best, C. J. The witness Dowling was properly rejected, as he had a direct interest in the result of the cause, being tenant by the curtesy of the property in respect of which the defendant made his claim. It is not necessary, therefore, to enter into the question, whether the record in this cause would have been evidence for or against him ; for supposing the plaintiff had failed, what was to prevent the witness from presenting to the very living in dispute ? Not the lapse of six months, for the bishop had not presented ; and, if the bishop had not presented, there was nothing to prevent the witness from presenting before the bishop. He had, therefore, a direct interest in the result of the cause, and was properly excluded.

With regard to the deed of 1672, if the defendant had established that it was purely voluntary and without consideration, it would no doubt, according to the principle established in *Doe d. Otley v. Manning*, have been void as against a subsequent deed made on good consideration : but there is no evidence that the defendant succeeded in establishing that point ; and on the contrary, the deed on the face of it is not destitute of adequate pecuniary consideration. If the sum named had been clearly nominal, as the five shillings or ten shillings now usually alleged for form to have been paid by trustees or the like, it might not have been adequate ; but who can say, when the value of money has so much decreased, that twenty shillings was not, 150 years ago, the full value of a share in an advowson, which the

purchaser might never live to have benefit of? As to the "faithful service and other considerations," though perhaps the expression was only inserted by the conveyancer as ornamental, yet there is no proof that they did not exist; and it is only under a semblance that Comyn lays it down that such service is not a sufficient consideration; he seems, too, to allude to gratuitous services, such as are not the subject of legal obligation. But there is nothing here to show that the services in question were of such a nature; and at this distance of time it may be presumed they were valuable services, to be rendered for an equivalent, and that this advowson was the equivalent agreed on. The deed, therefore, is valid on the face of it, and must prevail against a subsequent purchaser. The seisin of R. Isaac is stated correctly, and there is nothing in the objection raised in arrest of judgment. With respect to the answer in Chancery, it was filed by one who had at the time nothing in the premises, and was, therefore, properly excluded.

BURROUGH, J. I am clearly of opinion that the tenant by curtesy was not a witness in this case. With respect to the deed, I think the pecuniary consideration sufficient without the other services mentioned: it is not a mere formal sum, such as is usually alleged to have been paid by trustees, but a sum which was considerable in those days, and perhaps as much as the worth of an advantage so remote as that which was the object of the transfer.

GASELEE, J. I see no ground for disturbing this verdict. The witness rejected was the person who would actually have had the right to present, if a verdict had been obtained for the defendant; for though a living come to a bishop by lapse, he cannot refuse to institute, if a presentation be made before he has taken advantage of the lapse. With respect to the deed, it appears clearly that the twenty shillings was not considered a mere formal sum for the purpose of effecting the conveyance, but the value of the property sold, because it is specified before the other considerations; whereas sums inserted for mere form are usually specified after them. Considering the age of the deed, that only a fourth part of the advowson was sold, and that no evidence was given at the trial, of the annual value of the living at the time of the transfer, there is nothing to show that the pecuniary consideration was inadequate.

PARK, J. The case was left fully to the jury upon all the circumstances.  
Rule refused.

### VALE and Others, Vouchees.—p. 176.

Where one of the vouchees became insane between the time of executing the warrant of attorney and the passing of the recovery, the Court refused to let it pass as to him, but permitted it as to the other parties.

VALE, one of the vouchees in this recovery, was sane when he executed the warrant of attorney, but shortly afterwards he became a lunatic.

Stephen, Serjt., on a former day, upon affidavit of that circumstance, moved that the recovery might pass, the other parties all consenting.

The Court took time to consider, and now, referring to a case of *Jamieson*, demandant, *Fletcher*, tenant, in which the same motion was made last Hilary term, decided as in that case, that the recovery should pass as to all the parties except the lunatic, because, if he had recovered, he might have revoked the warrant before the passing of the recovery. (a)

(a) See *Walcot*, Vouchee, 3 Bingham 423, in which the same point was decided.  
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## MACKIE v. WARREN. — p. 176.

The Court will not discharge a defendant from custody under a *ca. sa.* on the ground that he has been before irregularly taken and discharged under criminal process at the instance of the plaintiff.

LUDLOW, Serjt., moved for a rule nisi to discharge the defendant from custody under a *ca. sa.* in this suit, on the ground, that some weeks before, he had been, at the instance of the plaintiff, apprehended under criminal process, irregularly issued, and then set at large, upon the irregularity being discovered, the plaintiff paying the costs. *Ludlow* urged, that the defendant could not have been retaken if he had been discharged after arrest on a *ca. sa.*, and that he ought to be equally exempt after discharge from the criminal process. But

*The Court*, admitting, that if the defendant had been discharged after he had been once regularly taken, he could not be taken again for the same cause, refused the rule, on the ground that the first taking here was altogether irregular; and *Ludlow*

Took nothing.

CHURCHILL and Another, Assignees of CADOGAN, a Bankrupt, v. CREASE. — p. 177.

1. A payment made in June, 1825, by a debtor, bona fide, without intention of fraudulent preference, eight days before a commission of bankrupt was issued against him, Held to be protected under the eighty-second section of 6 G. 4, c. 16.
2. The debtor, a prisoner, went, eight days before a commission of bankrupt was sued out against him, to a fire-office, to receive money, payable to him in respect of a loss by fire; a creditor, for labor done, who knew the time when the money was to be paid, without any intimation from the debtor, met him at the office, and obtained out of the sum so received, payment of his own debt, not knowing that his debtor was a prisoner or insolvent, a jury having negatived fraud, Held, that this was not a fraudulent preference by the debtor.

**ASSUMPSIT** for money had and received by the defendant, to the use of the plaintiffs as assignees of Cadogan.

At the trial before *Best*, C. J., London sittings after Trinity term, it appeared that the bankrupt, who was indebted to the defendant for work done by him as a paper-hanger and sizer, was committed to prison at the suit of some other creditor on the 19th of April, 1825, and remained there till the 18th June following, when a commission of bankrupt was sued out against him on the act of bankruptcy committed by his lying in prison:

That on the 8th of June, the bankrupt, who had suffered a loss by fire, went, by means of a day rule, to the Hope Insurance Office, to receive 56*l.* the amount of an insurance on the property consumed:

That the defendant, who had agreed for ready money, and who knew of the fire, and of the day fixed by the office for the payment of the sum insured, went thither, without having made any appointment with the bankrupt, for the purpose of meeting the bankrupt when he should have money in his hand; and, upon payment being made by the office, pressed for the settlement of his own account: whereupon the bankrupt paid him the amount, 19*l.* 10*s.*, and the defendant gave a receipt for that sum as for work done.

It did not appear that the defendant knew of the bankrupt's imprisonment or insolvency.

It was contended, that this payment was a fraudulent preference by the bankrupt; that even if made bona fide, it was not protected by the 19 G

2, c. 32, s. 1, which applies only to payments for goods or bills of exchange in the usual course of trade; and that the provision in 6 G. 4, c. 16, s. 82, which protects such payments, did not come into operation till 1st September, 1825.

These points were reserved, and the learned Chief Justice left it to the jury to say, whether the bankrupt had made this payment by way of fraudulent preference, or *bonâ fide* at the pressing instance of the defendant.

The jury found a verdict for the defendant, and also, that he did not know of the bankrupt's insolvency at the time of the payment in question.

*Wilde*, Serjt., having obtained a rule *nisi* to set aside this verdict, on the grounds relied on at the trial,

*Taddy*, Serjt., began to show cause, when the Court called on .

*Wilde* to support his rule. The circumstance of the bankrupt's having made this payment while he was a prisoner for debt, and only eight days before his commission was sued out, was sufficient to constitute it a fraudulent preference, especially as the debt was not demanded under legal process, which, indeed, could not have operated as matter of alarm on the bankrupt, inasmuch as he was already in confinement. The principle established in *Thornton v. Hargreaves*, 7 East, 544, therefore, applies immediately to the bankrupt's conduct. It was there laid down, that if the payment or assignment does not redeem the trader from any present difficulty, which is the ordinary motive for such a payment or assignment when really made under the pressure of a threat, it must be taken to have been made voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy.

But even if the payment were made *bonâ fide*, it was not protected by the 49 G. 3, because it was made within two months of the suing out of the commission; nor by the 19 G. 2, c. 32, because it was made after an act of bankruptcy, and not for goods or bills of exchange in the usual course of trade. The 6 & 7 G. 4, c. 16, s. 82, is out of the question, because, except as to bankrupts' certificates, and the repeal of the 5 G. 4, that act did not come into operation till the 1st of September, 1825. (s. 136). The clause, therefore, which protects all payments "made or hereafter to be made" *bonâ fide* before the date and issuing of a commission, can only apply to payments made and to be made after the 1st September, 1825.

The enumeration of the cases in which the act was to have a retrospective operation, excludes such operation in any other than the cases enumerated; *Maggs v. Hunt*, 4 Bingh. 212; and in case of doubt, the act is to be construed beneficially for creditors. (s. 135).

BEST, C. J. I am of opinion that this payment is protected by the 82d section of 6 G. 4, c. 16, which enacts, "that all payments really and *bonâ fide* made, or which hereafter shall be made, by any bankrupt before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy." It is true that, by the 136th section, the full operation of the act is postponed to a period subsequent to the payment in question; and I should have thought that section conclusive, if there had been no conflicting intention to be collected from the act: but the rule is, that where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. Now, unless the expression "payments made" refer to a period anterior to the passing of the act, the expression "hereafter to be made," is altogether nugatory. It seems to me, therefore, that the legisla-



ture contemplated all payments actually made at the time the act came into operation.

Then with regard to the alleged fraudulent preference, it has been contended, that if this were merely a voluntary payment, it amounted under the circumstances to a fraudulent preference as against the other creditors. But fraud must in all cases be proved, not presumed; and here the jury have expressly found, that the defendant was ignorant of his debtor's insolvency. Nor is it true that the payment was voluntary, and that the debtor would have been in no worse situation had he refused it; for he was liable to have a detainer lodged against him, and that consideration probably induced him to accede to the demand. The case of *Thornton v. Hargreaves* and others of that class, are not at all applicable. In *Thornton v. Hargreaves* the debtor assigned the whole of his property; and Lord *Ellenborough* said, "Taking the conversation reported between the defendants and the bankrupt to be a threat of process, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did, for that left him without any property, and he was immediately obliged to break up his business, and leave his home." *Lawrence, J.*, said, "If the bill of sale swept away the whole, as it is said, of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy, because it would be in itself an act of bankruptcy." Can that be compared to the payment of a debt of 19*l.* fairly contracted, and at the persevering instance of the creditor? It was for the jury to say whether or not there was any fraud in the transaction, and as they have in effect negatived its existence, this rule must be discharged.

*PARK, J.* All cases of this kind depend on their own circumstances, and it is for the jury to say whether any fraud has been committed or not: in the present instance, I think they have come to a right conclusion.

With respect to the question on the 6 G. 4, c. 16, the words of the act, "made, or hereafter to be made," are strong to show that it was intended to protect payments actually made at the time the act came into operation. Made, as contrasted with hereafter to be made, must mean heretofore made. And this payment was no fraudulent preference.

The defendant, a paper hanger, knew that his debtor was about to receive money at a fire office; he went thither on a day when the office paid for losses, and meeting his debtor with money in his hand, claimed the payment of his debt. He did not know that any act of bankruptcy had been committed, nor even that his debtor was insolvent; he did not sweep away the whole of the property, but merely obtained a small sum for labour, which was to have been paid for at the time it was done. There is no evidence to show anything like collusion, and the rule must be discharged.

*BURROUGH, J.* When I heard the finding of the jury, I thought the rule nisi ought not to have been granted; that finding excludes all doubt; the defendant knew nothing of the bankrupt's imprisonment or insolvency, and there is not even a suspicion of collusion. He received but a small part of a sum actually in the debtor's hands, and there was nothing resembling a general transfer of property.

*GASELEE, J.* I see no reason for interfering with the finding of the jury. It was very natural the defendant should go to the fire office at a time when he knew his debtor was to receive money, and there is not the slightest evidence to show that he went thither upon any intimation from the debtor.

The rule, therefore, must be

Discharged.

## HENMAN v. DICKINSON. — p. 183.

Where a party sues on an instrument which, on the face of it, appears to have been altered, it is for him to show that the alteration has not been improperly made.

THIS was an action brought to recover the amount of a bill of exchange, purporting to have been drawn the 29th of February, 1828, for 49*l.* 17*s.* 6*d.*, by one George Potter, accepted by the defendant, and indorsed to the plaintiff, but appearing on the face of it to have undergone alteration.

On the trial of the cause, before *Best*, C. J., London sittings after Trinity term, the wife of the drawer stated that the bill was drawn on the 22d February, 1828, that it was accepted on the 22d, for 40*l.* 17*s.* 6*d.*, and Potter in her presence altered the bill to 49*l.* 17*s.* 6*d.* about eight days before he indorsed it to the plaintiff. This evidence was objected to, and the point was reserved; but the learned Chief Justice thinking, that where there appeared an alteration on the face of a bill of exchange, the onus of proof to show that such alteration had not been made since it was accepted, lay with the plaintiff, a verdict was found for the defendant, with leave for the plaintiff to move to set it aside.

*Taddy*, Serjt., now moved accordingly, on the ground that Mrs. Potter had proved a forgery, and that a wife could not be permitted to give evidence to criminate her husband. *Rex v. Cliviger*, 2 T. R. 263. [*Park*, J. In *Rex v. All Saints, Worcester*, 1 Phill. Ev. 82, the Court of King's Bench were of opinion, that the rule laid down in *Rex v. Cliviger* was too large and general.] He then urged that a party who produces a bill with an alteration apparent on the face of it, ought not to be called on to show that the alteration was made before acceptance; but that the onus of showing that it was improperly made after acceptance ought to be thrown on the defendant, for an innocent indorsee has no means of knowing when or how such an alteration was made.

*BEST*, C. J. It is not necessary for us to decide the first point; if it were, it would require consideration, because the authority of *Rex v. Cliviger* has been doubted. But we are of opinion, that where an alteration appears upon the face of a bill, the party producing it must show that the alteration was made with consent of parties, or before the issuing the bill.

*PARK*, J. Where the plaintiff sues on an instrument which has manifestly been altered, it is for him to show that the alteration was not improperly made. I am sure this has been decided, and good sense points out that it ought to be so, because the defendant can have no means of knowing the circumstances of a subsequent alteration.

The rest of the Court concurred; and *Taddy*

Took nothing.

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COX v. BENT and Others. — p. 185.

Plaintiff, who had entered on premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him and his landlord:  
Held, that this constituted him a tenant from year to year, and liable to distress.

REFLEVIN for taking the plaintiff's goods in a place called the Newcastle Brewery.

Avowry, that the plaintiff for a year ending March 25, 1827, held the Newcastle Brewery as tenant to the defendants, by virtue of a demise

thereof to him, at the yearly rent of 450*l.*, payable half-yearly on 25th March and 29th September, and, because a year's rent was due, the defendants avowed the taking, &c.

Pleas, non tenuit and riens in arriere, and issue thereon.

At the trial, before *Gaselee*, J., last Stafford Summer assizes, it appeared that the plaintiff held the premises in question under an agreement bearing date 7th December, 1824, by which the defendants agreed to let and demise them to him "in consideration of the rent of 450*l.*, and of the covenants and agreements to be entered into by the said C. Cox, in a certain indenture of lease, to be executed on or before the 29th day of September next ensuing." The plaintiff had paid no rent, but an account of various dealings between him and the defendants had been presented to him by the defendants' clerk, the first item of which was, "Half a year's rent, 250*l.*;" when the plaintiff said, "It is overcharged 25*l.*;" and the clerk thereupon altered it to 225*l.* The account had been disputed in other respects.

The learned Judge thought that, by thus assenting to that item in the account, the plaintiff had admitted a tenancy from year to year at 450*l.* rent, payable half-yearly; and, under his direction, a verdict was found for the avowants, which

*Russell*, Serjt., now moved to set aside, and enter instead a verdict for the plaintiff. He relied on *Dunk v. Hunter*, 5 B. & A. 322, as an authority to show that an agreement for a future demise, by an indenture of lease, is incompatible with an actual demise, and that without an actual demise the avowants could have no right to distrain. He admitted that, according to the decision in *Knight v. Bennett*, 3 Bingh. 361, a payment of rent under such an agreement would constitute an acknowledgment of a tenancy from year to year, under which the landlord would be authorized to distrain. Here there had been no payment, but only an admission of an item in a disputed account.

*GASELEE*, J. I proceeded on the ground that the admission was equivalent to a payment of so much rent, and that the plaintiff had thereby become tenant from year to year.

*BEST*, C. J. This falls within the principle established by *Knight v. Bennett*.

Rule refused.

### SEATON v. BENEDICT. — p. 187.

Where a plaintiff furnished defendant's wife with articles of dress, which were rendered unnecessary by the defendant's having supplied her wardrobe amply, and in an action for the price of the articles, (18*l.* 5*s.* 6*d.*.) the jury found a verdict for plaintiff, damages 10*s.*, the Judge certified to deprive him of costs.

IN this cause, which was sent down for a second trial, pursuant to the decision ante, p. 354, the jury, upon the same facts as are there stated, having found a verdict for the plaintiff for 10*s.*, at the last Middlesex sittings before *Best*, C. J.,

*Wilde*, Serjt., moved to set aside this verdict, or that the learned Judge who presided at the trial should certify, to deprive the plaintiff of his costs.

The articles of dress for which the action was brought having been ordered by, and delivered to, the defendant's wife, and being unnecessary, the defendant having amply supplied her himself, he could only be liable for such as she had worn in his presence without objection on his part. The amount

of these was more than covered by 10*l.* paid into court. The verdict, therefore, was unintelligible; for if the jury thought necessary the articles not covered by the payment into court, they should have found for the whole 18*l.* 5*s.* 6*d.*; and if they were not necessary, the defendant was entitled to a verdict.

BEST, C. J. I shall certify; and it will be mercy to the plaintiff to do so; for the Court would grant repeated new trials rather than allow a verdict to prevail which is contrary to law and justice.

Rule absolute for the certificate.

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FURNELL v. THOMAS. — p. 188.

It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the defendant.

ACTION by the plaintiff, as a ship-owner, against the defendant, as charterer, for demurrage.

At the trial, before *Best*, C. J., London sittings after Trinity term, it appeared that the vessel had arrived in the port of London, laden with potatoes, the price of which was at the time of her arrival likely to fall in the market; whereupon the defendant, hoping that in a few days the price might rise, said to the plaintiff, "Don't show yourself, or you'll get down the price;" and the plaintiff accordingly abstained for some time to procure from the custom-house the papers necessary to authorize the unloading of the cargo. The defence set up was, that till he had procured these papers, which it was his business to procure, the vessel could not unload; and that the demurrage having thus been occasioned by his own omission, he could not recover from the defendant.

The learned Chief Justice being of opinion that it did not lie with the defendant to make this objection after he had, for his own purposes, requested the plaintiff not to show himself, a verdict was found for the plaintiff; which

*Wilde*, Serjt., now moved to set aside, on the ground that the plaintiff was bound to procure the papers from the custom-house before he could charge the defendant with delay; *Barret v. Dutton*, 4 Campb. 333; and that, at all events, the plaintiff, by acquiescing in the defendant's request for time, must be intended to have acquiesced on the terms of not charging for demurrage. A mere conversation could not exonerate the plaintiff from duties imposed by law.

BEST, C. J. I am of the same opinion as at *Nisi Prius*. Generally speaking, if the owner does not procure the necessary papers for the clearing or discharge of the ship, he cannot claim demurrage. But here he was prevented from doing so by the defendant's saying, "Don't show yourself, or you'll get down the price of my cargo;" and the defendant never informed him when the price rose. There can be no doubt the vessel was made a warehouse for the purposes of the defendant.

PARK, J. I am of the same opinion. It is urged that a mere conversation cannot exonerate the plaintiff from the rule of law; but this was a conversation followed by an act, namely, the defendant's keeping possession of the ship; and he does not appear ever to have applied to the plaintiff to procure the necessary documents.

The rest of the Court concurred, and the rule was

Refused

## ROOKE v. WASP. — p. 190.

Where defendant, after an application by plaintiff's attorney, paid plaintiff the debt demanded, without notice that a writ had been sued out, about which the plaintiff said nothing, and the attorney afterwards arrested defendant for the costs on a writ which had been sued out before the payment of the debt, the Court stayed the proceedings without costs.

On the 7th October last, the plaintiff's attorney wrote to the defendant, requesting payment of a debt of 23*l.*, due from the defendant to the plaintiff.

On the 11th, the defendant, not knowing that any writ had been sued out against him, paid the plaintiff himself the 23*l.*, and upon that occasion received no notice of any such writ. On the 16th, the plaintiff's attorney demanded the sum of 3*l.* 10*s.*, for costs, and not obtaining it, arrested and held the defendant to bail on the 3d of November, by virtue of a *capias* which had been issued on the 8th of October preceding.

Upon an affidavit of these facts,

*Jones*, Serjt., obtained a rule nisi to deliver up the bail-bond to be cancelled, and to stay proceedings.

*Taddy*, Serjt., who showed cause, urged that there was no other way by which the plaintiff could obtain the costs of his writ.

But the Court, under all the circumstances, ordered the proceedings to be staid without costs. (a)

Rule absolute to stay proceedings.

(a) See *Toms v. Powell*, 7 East, 530. *Page v. Wyle*, 3 East, 314.

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TURNER and Another v. PRINCE. — p. 191.

Arrest for 100*l.* Verdict for plaintiff, subject to an award; costs to abide the event; 39*l.* 18*s.* found to be due, and the transactions between the parties, complicated. The Court refused to allow the defendant his costs under 43 G. 3.

THE plaintiffs, who were builders, had agreed to let a house on lease to the defendant, after they should have finished it, according to a specified plan, "any deviation from the above method of finishing to be paid for or allowed for according to its value."

When the house was finished, and the defendant had entered, the plaintiffs, about August, 1826, sent him in a bill of 125*l.* 9*s.* 8*d.* for extra work.

Defendant declined paying, on the ground that the plaintiffs had not made out the lease; but

The lease having been executed on the 8th of March, 1827, and repeated applications having been made to the defendant, in vain, for payment of the 125*l.* 9*s.* 8*d.*, the plaintiffs, on the 26th of April following, arrested him on an affidavit of debt for 100*l.* and upwards.

The defendant paid 10*l.* 9*s.* 3*d.* into Court, and upon the cause coming on for trial in July, a verdict was taken for the plaintiffs, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred; the costs of the cause to abide the event, those of the arbitration to be in the discretion of the arbitrator.

Upon the reference, the defendant established a claim against the plaintiffs for an allowance for deviations from the method of finishing the house agreed on by them, to the extent of 63*l.* 13*s.* 2*d.*; and the arbitrator thereupon awarded that he should pay the plaintiffs 29*l.* 8*s.* 9*d.* beyond the sum paid into Court, together with the costs of the award. The plaintiffs' costs of the cause amounted on taxation to 68*l.* 6*s.* 3*d.*, which, with the 29*l.*

8s. 9d., the defendant paid into court in July last, under a Judge's order, staying proceedings till the result of an application on the subject to this Court should be known.

*Wilde*, Serjt., accordingly, upon affidavits disclosing the defendant's case, this term obtained a rule calling on the plaintiffs to show cause why, upon payment by the plaintiffs to the defendant of his costs of this suit pursuant to the 43 G. 3, c. 46, the sum of 29l. 8s. 9d., the residue of the sum paid into court under the Judge's order, should not be paid to the plaintiffs in satisfaction of their whole claim; the defendant contending that the arrest for 100l., when there were counter claims on his part, must be esteemed malicious, after the arbitrator had found only 29l. 8s. 9d. to be due beyond the 10l. 9s. 3d. paid into court.

*Taddy*, Serjt., showed cause. The costs of the cause were to abide the event of the award; and the arbitrator having established the verdict taken for the plaintiffs, the Court has no jurisdiction under the 43 G. 3. *Paine v. Acton*, 1 B. & B. 278, is in point against the application: but even if the Court could interfere after the award, it would decline doing so upon a disputed account in a complicated agreement, after a reference of all matters in difference.

*Wilde*. Though the reference was of all matters in difference, nothing was entered on before the arbitrator but matters in the cause. In *Summers v. Formby*, 1 B. & C. 100, it was holden that where a cause is referred upon a new trial, and nothing is said about costs in the rule granting the new trial, the plaintiff is not entitled to his costs of the former trial, although the arbitrator decides in his favour; and from what fell from the Court in that case, it is clear that the award of an arbitrator does not deprive the Court of its jurisdiction to allow the defendant costs under 43 G. 3, c. 46. "The reference was equivalent to a trial, and it has been held to be so, so as to entitle the defendant to costs where the plaintiff does not recover the sum for which the defendant was arrested."

BEST, C. J. I will not say that the Court will in no case grant a rule to give the defendant his costs where the arrest is for 100l. and the plaintiff recovers only 39l. But it must be a very strong case. This is much too complicated a transaction for us to say that the defendant could successfully sue the plaintiff for maliciously holding him to bail; and unless he could do so, there is no ground for making this rule absolute.

Rule discharged.

#### SHARPE, Assignee of the Sheriff of MIDDLESEX, v. ABBEY and Others. — p. 193.

In a declaration on a bail-bond, it is not necessary to aver that the writ on which defendant was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to.

DEBT on bail-bond by the assignee of the sheriff.

The plaintiff declared that by virtue of a writ ca. ad resp. directed to the sheriff of the county of Middlesex, out of the Court of our Lord the King of the Bench at Westminster in due manner issued, and returnable therein in fifteen days of Easter, 1828, Robert Abbey was taken and arrested by the sheriff at the suit of the plaintiff, by which writ the sheriff was commanded to take Abbey, if he should be found in his bailiwick, and safely to keep him so as to have his body before our Lord the King's Justices at Westminster, in fifteen days of Easter, 1828, to answer the plaintiff in a plea of trespass, and also, according to the custom of his Majesty's

Court of Common Bench, in a plea of trespass on the case on promises to the damage of the plaintiff of 300*l*.

The declaration then stated in the usual way, that the sheriff took bail for the appearance of Abbey, who, before the return of the writ, executed a bond conditioned for Abbey's appearance; that Abbey did not appear, and that the sheriff assigned the bond to the plaintiff. Breach, non-payment.

Demurrer, on the ground that the declaration contained no allegation that any affidavit was made and filed of any cause of action of the said plaintiff against the said Robert Abbey, amounting to the sum of 20*l*. or upwards; nor that the sum or sums specified in any such affidavit were indorsed upon the back of the writ in the declaration mentioned; nor that the writ was marked or indorsed for bail for any sum of money for which the defendant might be lawfully held to bail, or for any sum whatever; nor that the bail taken by the sheriff in the declaration mentioned, was taken for the sum or sums indorsed upon the writ.

*Wilde*, Serjt., in support of the demurrer, admitted that the case of *Whiskard v. Wilder*, 1 Burr. 330, was in point against him; but relied on the disapprobation of that decision expressed by *Mansfield*, C. J., in *Hill v. Henle*, 2 N. R. 202, and on the positive requisition of the statute 12 G. 1, c. 29, that the sum for which the defendant is arrested shall be indorsed on the writ.

BEST, C. J. The question is, not whether an affidavit of debt, or an indorsement on the writ of the sum sworn to, be necessary to the validity of an arrest, but whether it be necessary in an action on a bail-bond to encumber the record with statements of this preliminary matter. The case of *Whiskard v. Wilder* has recently been confirmed in this Court by the case of *Wilcox v. Nightingale*, 4 Bingh. 501.

PARK, J. It was also confirmed in *Arundell v. White*, 14 East, 224.

GASELEE, J. It is not necessary for us to decide whether the statute of G. 1 is directory or imperative; the only point here is, whether what is prescribed by that statute with regard to arrests should appear on the declaration in an action on a bail-bond. The precedents are both ways, but the form pursued in the present case is the more usual.

Judgment for the plaintiff.

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### CHRISTIE v. HAMLET. — p. 195.

In moving to set aside an award made under a rule of court, the rule nisi ought to be drawn up on reading the rule under which the matter was referred, and the objections to the award ought to be specified.

THIS cause was referred to arbitration by an order of the Chief Justice, made "upon hearing the attorneys on both sides, and by their consent."

The arbitrators commenced their award by reciting, that the cause came on to be tried at the sittings at Guildhall, in June, 1828, before the Lord Chief Justice; and that then, by consent of plaintiff and defendant, their counsel and attorneys, an order was made that it should be referred to the arbitrators in question.

*Wilde*, Serjt., upon an affidavit that no such order of Nisi Prius as that set out in the award had ever been made, obtained a rule nisi to set the award aside; but the rule did not state on what grounds, nor was it expressed to have been drawn up on reading the rule of Court on which the

cause had been referred; that rule, however, was set out in the affidavit above mentioned.

*Taddy*, Serjt., who showed cause, objected that the rule nisi ought to have been drawn up on reading the rule which authorized the arbitration, and that the objections to the award ought to have been specified in the rule nisi, as, in a rule for setting aside an annuity, the objections to the grant.

*Wilde* urged, that it was sufficient that the original rule had been set out in the affidavit to which the rule nisi referred; but

The Court was against him upon both grounds, and added, that they had no authority to interfere, the award being a nullity which they could not enforce by attachment.

Rule discharged.

### VICKERS v. GALLIMORE. — p. 196.

Trespass qu. cl. fr.; pleas, not guilty, and justifications under a right of way. Issue joined on not guilty; right of way traversed, and issue joined thereon. New assignment and judgment by default thereon. Verdict for plaintiff 1s. on issue of not guilty; 40s. damages on the new assignment; verdict for defendant on one of the justifications: Held, that the plaintiff was entitled to the general costs in the cause.

TRESPASS for breaking and entering the plaintiff's close, and prostrating his wall.

The defendant pleaded, first, the general issue, not guilty, and then seven special pleas, justifying the trespass under an alleged right of way. The plaintiff, in reply, joined issue on the first plea, traversed the special pleas, and new assigned. The defendant joined issue on the traverses, and suffered judgment to go by default on the new assignment.

At the trial, last Yorkshire assizes, a verdict was found for the plaintiff with 1s. damages, on the general issue, and on all the other pleas except the third, on which a verdict was found for the defendant. The damages on the judgment by default on the new assignment, were, by consent, assessed at 40s., on the understanding that the finding to that amount should not affect the question of costs.

*Cross*, Serjt., on the ground that a record in this state showed the substantial merits of the cause to be with the defendant, obtained a rule calling on the plaintiff to show cause why the postea should not be delivered to the defendant.

*Wilde*, Serjt., showed cause. If the defendant had not pleaded the general issue, or had withdrawn it (1 Wms. Saund., last edit. 300 a), there might have been some colour for the motion. As it is, by allowing that plea to stand, he has compelled the plaintiff to incur the expense of a trial, and the verdict being in his favour upon the issue on that plea, after a judgment by default on the new assignment, he is entitled to the general costs of the cause. *House v. The Commissioners of the Thames Navigation*, 3 B. & B. 117, is precisely in point. So likewise, *Longden v. Bourn*, 1 B. & C. 278.

*Cross*. If the verdict for the defendant goes substantially to the whole cause of action, he is entitled to the general costs of the cause. In *House v. The Commissioners of the Thames Navigation*, a plea of license, on which the defendant obtained a verdict, went only to a part of the cause of action, and the Judge certified that the trespass was malicious. In *Longden v. Bourn*, the plaintiff recovered 100l. damages on the new assignment.



But in the present case the damages were purely nominal, and the defendant having established her right of way, the third plea went to the root of the plaintiff's action. If the plaintiff had suffered judgment by default on the third plea, there would have been no necessity for going to trial; and not having done so, the defendant is entitled to the general costs. *Thornton v. Williamson*, 13 East, 191.

But *Othir v. Calvert*, 1 Bingh. 275, which is subsequent to any of the cases cited, and in which the Court took time to inquire into and settle the practice, is in point for the defendant. There, to a declaration in trespass *quare clausum fregit*, the defendant pleaded the general issue, and ten special pleas justifying the trespass under a right of way. The plaintiff traversed the right of way, and new assigned. Issue was joined on the general issue and on the traverses, and not guilty pleaded to the new assignment; on which, likewise, issue was joined. Verdict for the plaintiff, without damages, on the general issue; (as in *House v. The Commissioners of the Thames Navigation*); for the defendant on the two first special pleas, and for the plaintiff on all the other issues. It was holden on the authority of *Benett v. Coster*, 1 B. & B. 465, and *Vivian v. Blake*, 11 East, 263, that where a plea which goes to the whole of the cause of action is found for the defendant, the general costs of the cause go to the defendant, and to the plaintiff only the costs of the pleadings on the issues found for him. The principle is, that where issues are found for both parties, costs shall be awarded according to the substantial merits of the cause. *Harber v. Rand*, 9 Price, 336.

BEST, C. J. The question has been decided by the cases of *House v. The Commissioners of the Thames Navigation*, and *Longden v. Bourn*. The pleadings in those cases were precisely the same as in the present—Not guilty, on which issue was joined; justifications of the trespass, under rights of way and a license, which were traversed; and a new assignment, on which judgment was suffered to go by default. Verdict for the defendant on some of the justifications, and for the plaintiff on the other issues. The Court held, that as the plaintiff had been driven to trial by the plea of not guilty, he was entitled to the general costs in the cause.

In *Harber v. Rand*, the general issue was not pleaded. The costs must be determined by the state of the record at the end of the cause; to enter on the merits for that purpose would lead to new and intricate inquiry; and if the defendant pleads an unnecessary plea, he must pay for the expense occasioned by it. The plea of not guilty rendered it necessary for the plaintiff to go to the expense of proving the trespass, and the defendant ought to bear that expense, or to have withdrawn the general issue, as is suggested in the note in *Wms. Saunders*, 300, a.

PARK, J., concurred.

BURROUGH, J. The substantial merits of the cause cannot be entered into upon a motion like this. We must look at the record. The defendant compelled the plaintiff to go down to trial on the general issue, and the verdict having been for him on that issue, he is entitled to his costs.

GASELEE, J. *House v. The Commissioners of the Thames Navigation*, and *Longden v. Bourn*, are in point. In *Harber v. Rand*, there was no general issue. The rule must be

Discharged.

## RIDDELL v. SUTTON, Executrix of SUTTON. — p. 200.

1. Debt lies against an executrix upon a cause of action accruing after the death of the testator.
2. Where an executrix referred to arbitration to be finally determined on, certain disputes and differences respecting certain unsettled accounts, and the arbitrators, without finding assets, awarded her to pay a certain sum: Held, that plene administravit was no bar to an action on the award.

DEBT, on an award. The declaration stated, that by an agreement made 31st December, 1822, between the plaintiff, on the one part, and the defendant, as executrix of Sutton, of the other part, after reciting therein that disputes and differences had arisen, and were depending between the plaintiff and the defendant as executrix as aforesaid, respecting certain unsettled accounts between them, which they had mutually agreed to refer to the award and determination of the persons thereafter named; therefore, for the finally settling such disputes and differences, it was, amongst other things, agreed by and between the parties thereto, mutually and reciprocally, that the said matters in dispute between them should be, and were thereby referred to the final award and determination of Thomas Rushton and Thomas Birch, so as they should make their award before the 20th of January then next; and if they should not do so, the matters in difference were referred to the award and determination of such person as umpire as should be named in manner thereafter mentioned; costs to be in the discretion of the arbitrators or umpire; that the said Thomas Rushton and Thomas Birch, having taken upon themselves the said arbitration, and having heard and duly weighed the allegations and proofs of both of the said parties concerning the matters so in difference as aforesaid, and having examined the various books, accounts, papers, and writings relating to the said matters in dispute, and also the said parties themselves, did, in due manner and within the time limited for making the said award, to wit, on the 18th of January, in the year of our Lord 1823, at, &c., make their award and determination of and concerning the said matters in dispute, so referred to them as aforesaid, in writing under their hands, ready to be delivered to the said parties, or such of them as should require the same, bearing date on a certain day and year, to wit, the same day and year in that behalf aforesaid. And by the said award, they, the said Thomas Rushton and Thomas Birch, did find that there remained a balance due from the said defendant to the said plaintiff of 54*l.* 0*s.* 10½*d.*; and they did, therefore, thereby award, order, and direct the payment of such balance to be made by the said defendant to the said plaintiff, on or before the 31st day of March then next. And they did thereby further award, order, and direct, that each of the said parties in difference should pay his and her own costs and charges attending the same reference. That the said defendant, executrix as aforesaid, did not, nor would, on the said 31st day of March, in the year 1823, aforesaid, make payment to the said plaintiff of the said balance or sum of 54*l.* 0*s.* 10½*d.* in the said award mentioned, or any part thereof, nor has she since paid the same, or any part thereof.

The defendant pleaded, first, non detinet, on which issue was joined. Secondly, plene administravit; and, thirdly, that no evidence was given or offered before the said Thomas Rushton and Thomas Birch, on occasion of the said arbitration, nor did they, the said Thomas Rushton and

Thomas Birch, receive any proof, nor was it admitted by or on behalf of the said defendant, that she, the said defendant, as executrix as aforesaid, had, at any time, before the making of the said supposed award in that Court mentioned, in her hands any goods, chattels, moneys, or effects, which were of the said William James Sutton, deceased, at the time of his death to be administered.

Demurrer inde, and joinder.

*Russell*, Serjt., in support of the demurrer.

The pleas are ill. First, the plea of plene administravit; because the mere general submission to arbitration was an admission of assets: *Barry v. Rush*, 1 T. R. 691. In that case, the defendant bound himself, as administrator, to abide by an award to be made touching all matters in dispute between his intestate and another person; and the arbitrator awarded that he, as administrator, should pay a certain sum of 298*l.*, and it was held, that he could not plead plene administravit to debt on the bond. It was contended, that the defendant was not bound by the terms of the award to pay the money awarded, absolutely, but only as administrator, out of the assets of the intestate. But *Ashhurst, J.*, said, "There is no doubt but that this plea is bad, for the entering into the bond amounts to an admission of assets, and the defendant shall not afterwards be permitted to dispute it. The bond given by the defendant to abide by the award was an undertaking to pay whatever sum the arbitrator should award, without any regard to assets." And *per Buller, J.*, "This is a bond given by the administrator, by which he bound himself, his heirs, executors, and administrators. The question, then, is, Whether he had bound himself personally or not; and I think there can be no doubt but he has." *Pearson, and others, Assignees of Scott, a Bankrupt, v. Henry*, 5 T. R. 6, which will probably be cited on the other side, was not an action on an award, but assumpsit for goods sold and delivered; to which the plea was, plene administravit, and, in order to prove assets, a submission to arbitration by the defendant, as administrator, and an award whereby the sum of 2014*l.* was awarded to be due from the intestate to the bankrupt's estate (but not saying by whom it was to be paid), was given in evidence. This was held, under the circumstances, not to be an admission of assets; for the submission did not appear to have been anything more than a submission to take accounts. The submission in the present case is of all matters in dispute; and in *Robson and another, Assignees, &c. v. ———*, 2 Rose, 50, the Lord Chancellor said, "If an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission." So in *Wansborough v. Dyer*, 2 Chit. Rep. 40, it was decided that the trustees of an insolvent debtor by entering into an arbitration bond, admitted that they had assets. Here, too, the arbitrators not only ascertained the amount of the demand, but awarded the defendant to pay that amount, which of itself is a determination of the question of assets; as may be collected from what fell from Lord Kenyon in speaking of the case of *Barry v. Rush*, "There the defendant submitted to pay what was awarded, and the arbitrator did award that he should pay a certain sum, but here (in *Pearson v. Henry*) the arbitrator has only ascertained the amount due from the intestate, but has not directed the defendant to pay it." And he considers the effect of a bond to abide the award, as an undertaking to pay whatever the arbitrator should award, without any regard to assets. Here the agreement set out in the declaration amounts in effect to an agreement to abide by the award. And the case of *Worthington v. Barlow*, 7 T. R. 453, is conclusive on the point. Lord Kenyon there said, "The decision in *Pearson v. Henry* must be taken with

reference to the facts of that case. There the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it, but here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix was a reference not only of the cause of action, but also of the other question, Whether or not the administratrix had assets? And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay the debt."

The last plea,—that no evidence was offered of assets, nor were they admitted,—is clearly bad.

If the defendant does not choose to bring forward that ground of defence, it must be taken as admitted. She ought at least to have offered evidence, and is, in fact, pleading her own default. If, as the Lord Chancellor said in *Robson and another, Assignees, v. ———*, the submission without protesting, &c., is an admission of assets, the attending the arbitrator and going through a case without bringing forward that point, must be an admission. Even the misconduct of an arbitrator in not having heard evidence cannot be pleaded in bar to an action on bond, conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the Court to set aside the award: *Braddick v. Thompson*, 8 East, 344. And in the notes to *Veale v. Warner*, 1 Wms. Saund. 327 a, it is said, "There seems to be no case or dictum where a plea of this sort has been held to be pleadable, nor a precedent of such plea to be found in any of the books of entries."

*Storks, Serjt., contra.* Taking the whole of the submission together, this was not a submission of all matters in difference, but merely a reference of accounts, so that the arbitrators have exceeded their authority in ordering payment by the defendant; at all events, in ordering payment without finding or requiring evidence of assets. The pleas, therefore, are not affected by the cases relied on for the plaintiff, for in all those cases the submission was substantially of all matters in difference, and *Pearson v. Henry* is in point for the defendant. In *Love v. Honeybourne*, 4 Dowl. & Ryl. 814, where an arbitrator ordered an executor to pay a sum out of the assets in his hands, although the Court did not decide the point whether a submission to arbitration by the executor was an admission of assets, *Abbott, C. J.*, spoke on the point in terms of doubt, saying, "It may not conclude him from questioning whether he has any assets or not to pay the money;" and *Holroyd, J.*, said, "If the plaintiff had fully administered at that time, he would not be bound to pay."

But the declaration is ill; for the action being against an executrix is improperly conceived in debt. 1 Wms. Saund. 68, note 2. *Pinchon's case*, 9 Rep. 87 b.

*Russell.* In *Love v. Honeybourne*, the award being expressly to pay out of assets, the executor was not personally bound.

The objection to the declaration is ill founded: for this action of debt is brought on a debt contracted by the executor, but it is only on debts contracted by the testator that an action of debt does not lie against the executor, and that exemption rests on the obsolete doctrine of wager of law, which is now altogether discountenanced: *King v. Williams*, 4 Dowl. & Ryl. 3. Though an executor could not undertake to wage his law of a debt alleged to have been contracted by his testator, he is competent to do so with respect to a debt contracted by himself.

*BEST C. J.* This is an action of debt against the defendant as executrix of Sut.on, on an award which has proceeded on her submission.

It has been objected on her part, first, that the action of debt does not lie against an executor; but the principle on which that has been decided is, that an executor cannot wage his law of a debt contracted by his testator; it does not apply, therefore; to a case like the present, where the undertaking to pay has originated with the representative, who is therefore better acquainted with the transaction than the testator could have been.

It has been contended, secondly, that a plea of plene administravit is a good answer to the plaintiff's demand; I think it is not. The case of *Robson v. —* contains all the good sense that bears on the subject: if a reference be submitted to by an executor, and he does not protest, in the first instance, that he has no assets, he should not be afterwards allowed to say so, because in that case the opposite party will have been put to the expense of an arbitration to no purpose. The arbitration should be placed on the same footing as an action, in which, if an executor omit to plead that he is without assets, he cannot afterwards set up that ground of defence.

There is no ground for asserting that the arbitrator's authority was in this case limited to the investigation of accounts and finding a balance. The agreement set out in the declaration recites, that disputes and differences were depending between the plaintiff and defendant respecting certain unsettled accounts, and that for *finally settling* such disputes and differences, it was agreed that the said matters in dispute between the parties should be referred to the *final* award and determination of the arbitrators. But the arbitrators could not finally settle the disputes between the parties by merely finding a balance.

The allegation that no evidence of any assets was tendered to the arbitrators, cannot be the subject of a plea. For aught that appears on the plea in which this is alleged, the possession of assets might not have been disputed; and if the arbitrators have misconducted themselves, that is ground for another mode of proceeding. Our judgment must be for the plaintiff.

PARK, J. I have no doubt in this case. The third plea goes chiefly to show misconduct in the arbitrators, which ought, if it existed, to be the subject of an application to the Court, and not of a plea. But looking at the recital in the submission, and at the whole of the case, I think it clear that the defendant admitted assets, and submitted to a final settlement of all disputes; that could not be but by paying what should be found due.

BURROUGH, J. There could be no wager of law in this case, the cause of action being a written agreement, which is set out in the first count. The arbitrators had authority to decide in the manner they have done, and to award payment. The pleas are a mere experiment.

GASELEE, J. I thought the point too clear to be argued, and am still of opinion that the plaintiff is entitled to judgment. The objection on the ground of wager of law does not apply, because this action is not brought on a contract of the testator's. With regard to the question of assets, the defendant, by submitting to a reference, without protesting that she was not furnished with assets, must be taken to have left the mode of payment to the consideration of the arbitrator.

Judgment for the plaintiff.

## AMNER and Another v. CATTELL. — p. 208.

The Court discharged a rule for changing the venue, on an affidavit that the defendant's attorney had said he should change the venue to postpone the trial, and (which was the fact) that, in the interim, an act would come into operation which would defeat the plaintiff's claim. *Gaselee, J., dissentiente.*

INDEBITATUS assumpsit, to which the defendant pleaded the statute of limitations, and the plaintiff replied that the cause of action accrued within six years.

*Adams, Serjt.*, having obtained a rule nisi, on the part of the defendant, to change the venue from London to Warwick, on the usual affidavit,

*Merewether, Serjt.*, showed cause upon an affidavit of the plaintiff's attorney, which stated that he had, upon commencing the action, written to the defendant's attorney, informing him of the defendant's admissions, and promises of payment of the debts sought to be recovered; that he afterwards called on the defendant's attorney for his undertaking for the appearance of the defendant, when the attorney informed him that Lord Tenterden's act came into operation on the 1st of January, and that he should change the venue, and beat the plaintiff, as he had no promise in writing.

The learned Serjeant contended that it was evident the defendant did not seek to change the venue, because the cause of action arose in Warwickshire, or to further the purposes of justice, but because the trial would, by such change of venue, be postponed to a period at which the plaintiff's claim might be defeated by a law coming into operation after the commencement of his action. The object of permitting a change of venue was to advance the ends of justice; and where such a design as the present was made manifest, the Court would best consult the ends of justice by discharging the rule.

*Adams.* The rule for changing the venue has, hitherto, been always granted as a matter of right, unless the opposite party will undertake to give material evidence in the county from which it is proposed to remove the cause. It is, therefore, unnecessary to enter into the alleged conversation on the subject of the new statute; but if that statute were passed for the furtherance of the ends of justice, by setting disputes at rest after a certain lapse of time, the defendant's intention, as alleged, is in furtherance of the statute, and has nothing in it opposed to the ends of justice. At all events, he should be allowed to answer an affidavit so out of the usual course on such a rule.

*BEST, C. J.* I think the venue ought not to be changed in this case; but, in discharging the application, the Court does nothing inconsistent with the provisions of the new act; on the contrary, it falls in with the intentions of the legislature, because it was with a view to prevent an ex post facto operation with respect to suits already commenced, that the period of the act's coming into force was postponed till six months after it passed. To make this rule absolute would be, in effect, to put off the trial till after the next term, while, if it were tried after the present term, the plaintiff might succeed on a parol promise, which, when the act came into operation, might prove insufficient; though upon that point I abstain from pronouncing any opinion: but acting on the spirit of the postponing clause, we ought not to prevent the plaintiff from

trying his cause, if he be enabled to do so, within the time limited by the act for the continuance of the old law.

I do not agree that no cause can be shown against a rule of this sort, but undertaking to give material evidence in the county from which it is sought to remove the venue. I have often heard other causes shown; and where it appears that justice cannot be had if the venue is changed, it ought not to be changed.

Supposing a plaintiff to rely on a promise, which would be available but for the postponement of a trial, it would be doing injustice to postpone it. I think, therefore, this rule ought to be discharged.

PARK, J. I am of the same opinion; and I agree that upon motions of this kind other causes may be shown against the rule, besides undertaking to give material evidence in the county from which it is sought to remove the venue. In the King's Bench they are made the subject of a separate motion, but in this Court they may be brought forward in showing cause against the original rule. With respect to the new statute requiring a written promise to render a party liable in respect of a debt extinguished by the statute of frauds, no one approves of it more than I do. But, in seeking to further the object of that statute, we must be careful not to do injustice. When the legislature gives six months before allowing the act to come into operation, it indicates an intention to enable parties, now relying on parol promises, to sue on them effectually. The plaintiff, for that purpose, lays his venue in London, where his cause will come to trial before the six months have elapsed; the defendant seeks to defeat the claim by removing the cause to Warwick, and we should be lending ourselves to injustice if we were to assist him in his attempt.

BURROUGH, J., thought the defendant had a right to change the venue as a matter of course, unless the plaintiff undertook to give material evidence in the county in which it was first laid; and that if the plaintiff had any malpractice to complain of, he should make it the subject of a separate motion, in which the defendant might answer his affidavits. It would lead to great inconvenience if he could, on the defendant's motion, prevent the change of the venue by an affidavit which the defendant had no opportunity of answering, and which might be all false. Upon the present occasion, he proposed that the defendant's attorney should be allowed to answer the affidavit of the plaintiff's attorney, but was willing to concur in discharging the rule, if such affidavit should not prove to be an answer to the former.

GASELEE, J. I think this rule ought to be made absolute, although I agree that the plaintiff, on showing cause, may allege other matters, besides an undertaking to give material evidence in the county where he has laid the venue, and that we may, where it is requisite, permit the defendant to answer the matters in the plaintiff's affidavit. But we are to consider the law as it now stands, and not to look at an act which is not yet come into operation; and under the law as it now stands, the plaintiff has shown no cause why the venue should not be changed. But, even with respect to the new law, if we were to discharge the defendant's rule, we should, contrary to the spirit of the act, encourage suits upon every parol promise made since last May.

The Court then permitted the defendant's attorney to answer the affidavit of the plaintiff's attorney; but the answer not containing, in

the opinion of the Court, an explicit denial of the language ascribed to him in the affidavit of the plaintiff's attorney, the rule was

Discharged.

MACKLIN v. WATERHOUSE, CLENCH, and L. O. WEEKS.—  
p. 212.

A notice that the proprietor of a general coach-office will not be responsible for the carriage of parcels of more than 5*l.* value, unless entered as such, will not avail the proprietor of a coach who takes a parcel from the office, unless it be otherwise shown that he is connected with the office.

2. The carrier's agent telling the female servant of the owner of a parcel above that value, that it ought to be insured, Held, not a sufficient notice of the limitation of the carrier's responsibility.

THE plaintiff declared, that whereas he, at the special instance and request of the defendants, had caused to be delivered to them, on, &c., at, &c., and the defendants had then and there received into their care and custody a certain package or parcel containing divers promissory notes, for the payment of divers sums of money to bearer on demand, and divers pieces of current coin of the realm, of great value, (sc. 49*l.*.) to be safely and securely carried and conveyed by the defendants, by a certain conveyance called the Exeter mail, from Salisbury to London, and at London to be safely and securely delivered for the plaintiff, for certain reasonable hire and reward to the defendants in that behalf, yet the defendants, not regarding their duty in that behalf, did not safely or securely carry or convey, or cause to be carried or conveyed, by the said conveyance called the Exeter mail, or in any other manner, the said package or parcel and its contents, from Salisbury to London, nor at London safely or securely deliver the same for the plaintiff; but so negligently and improperly behaved and conducted themselves in the premises, that by and through the negligence, carelessness, and default of the defendants in the premises, the package or parcel aforesaid, and its contents, of the value aforesaid, became and were wholly lost to the plaintiff, to wit, at, &c.

There was a second count in trover. Plea, not guilty.

At the trial, before *Best*, C. J., London sittings after Easter term, it appeared that the defendants were proprietors of the mail-coach running from Exeter through Salisbury to London:

That the plaintiff's agent sent his female servant with a parcel containing country bank-notes and sovereigns, amounting in value to 49*l.*, to a coach-office in Salisbury, kept by one Weeks; on the outside of which was painted "Weeks's mail and general coach-office;" but whether he was Weeks, one of the defendants, did not appear. The servant stated, that she told the office-keeper it was a parcel of consequence; a parcel of value, though she did not know of what value; and the office-keeper said, he thereupon told her it must be insured. It was booked for London, however, and not insured.

The following notice was suspended in the office:—"Take notice the proprietor of this office will not be accountable for any parcel or package exceeding the value of five pounds, unless entered as such, and paid for accordingly."



The plaintiff and his agent were aware of this notice in Week's office.

The parcel was forwarded to London by the defendants' coach; and in London it was, according to an admission of one of the defendants, stolen by a boy appointed by them to watch that and other parcels. No account was given by the defendants of the boy's character when they took him into their service.

On the part of the defendants, it was objected by *Wilde*, Serjt., the evidence of a loss by felony did not sustain the allegation in the declaration, that the parcel was lost by negligence; especially as the defendants were not charged as common carriers; that the statement of their contract ought to have been accompanied with a statement of the notice by which they had limited their responsibility; *Latham v. Rutley*, 2 B & C. 20; and that, at all events, the notice was sufficient to exonerate them from liability for any loss, that did not occur through gross negligence. The question on this point was reserved; and the jury, under the direction of his Lordship, found for the plaintiff.

They found also, that there had been no negligence or concealment on his part, and that there had been negligence on the part of the defendants.

*Wilde*, Serjt., having, upon the foregoing objections, obtained, in Trinity term, a rule nisi to set aside this verdict, and enter a nonsuit, or have a new trial instead,

*Taddy*, Serjt., showed cause. There is no evidence to show that the defendants are connected with the notice by the proprietor of Week's office; but even if it were their notice, it was matter of defence, and not a fact necessary to be mentioned in the declaration, especially upon a proceeding in tort, where the defendants are charged by virtue of their common-law responsibility as carriers, and not upon the precise terms of any contract. The statement in the declaration sufficiently shows that the defendants are sued as common carriers. In *Clarke v. Gray*, 6 East, 564, the Court decided that even in assumpsit it was not necessary to state in the declaration against a carrier, a notice that no more than 5*l.* would be accounted for for any goods delivered at the defendant's office, unless entered and paid for accordingly, because it formed no part of the consideration for the act, or of the entire act which was to be done in virtue of such consideration; which is all that it is necessary to state of any contract consisting of several distinct parts.

So, in *Smith v. Horne*, 8 Taunt. 146, *Borough, J.*, says, "Notice does not constitute a special contract;" "it only arises in defence of the carrier." In *Latham v. Rutley*, the action was assumpsit, and the omission objected to in the declaration was not the omission of a notice like the present, but an exception in the body of the contract, of responsibility for fire or robbery. A notice, however, from the proprietor of an office, is not esteemed a notice from the proprietors of a coach. In *Garnett v. Willan*, 5 B. & A. 53, where the notice would have been sufficient had not the defendants wilfully divested themselves of the care of the parcel which was lost, it was a notice from the proprietors of the public carriages, who transacted business at the office where the parcel was booked. And the Court will narrow rather than extend the exemption sought to be attained by the notice. *Beck v. Evans*, 16 East, 247. At all events where the carrier receives a reward for his services, a notice will not exempt him from responsibility for losses accruing by his own negligence: *Garnett v. Willan*, *Beck v. Evans*. And felony by his servant must be esteemed the same thing as negligence in the carrier, unless he shows, which was not shown in the present case, that he took to ascertain the character of the servant before engaging him. In the

old entries, the custom of carriers is alleged, "absque subtractione, omissione, seu spoliatione, portare tenentur." Vid. 27. 1 T. R. 29. And the same degree of responsibility is still enforced: *Brooke v. Pickwick*, 4 Bingh. 218.

*Wilde*. (*Spankie*, Serjt., was with him.) This was the defendant's notice, because the keeper of the office must be esteemed their agent for the reception and transmission of parcels; his contract, therefore, becomes theirs, and is clearly adopted by their receiving the parcel into their coach from his office. Had the parcel been lost or destroyed in the office, the defendants would, but for the notice, have been responsible, as much as if the loss had happened in the coach. In *Newbond v. Just*, 2 Carr. & P. 76, a similar notice by the proprietor of an office was held to apply to the carrier, and not to the office-keeper. If so, it ought here to have been stated in the declaration. It was an essential part of the contract, inasmuch as it entitled the defendants to charge more for extra risk (*per Lawrence, J.*, in *Harris v. Packwood*, 3 Taunt. 264, *Marsh v. Horne*, 5 B. & C. 322), and, therefore, affected the consideration as much as an exception of fire or robbery. In *Clarke v. Gray*, the notice was not like the present, an essential part of the contract, but a mere limitation of damages; and in *Latham v. Rutley*, *Abbott, C. J.*, says, "The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading, but if a stipulation be made, that under certain circumstances he shall not be liable at all, that must be stated." Here the defendants stipulated not to be liable at all, if goods above the value of 5*l.* were forwarded without being entered and paid for as such. The plaintiff here has undertaken to state the contract, and where he does that, he must state it correctly, whether the action be *assumpsit* or *case*. Then, where such a notice has been given, the carrier is only liable for gross negligence; (*Nicholson v. Willan*, 5 East, 507; *Lowe v. Booth*, 13 Price, 329; *Bodenham v. Bennett*, 4 Price, 31); and the jury here have not found the negligence to be gross. Felony in the servant was not a negligence for which the defendants were responsible; a master not being answerable even for the tortious acts of his servant, if done wilfully and out of the course of his employment. *M'Manus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & A. 590; *Finucane v. Small*, 1 Esp. 315. *Cur. adv. vult.*

For the judgment, see the end of the next case.

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### RILEY and Others v. HORNE and Others. — p. 217.

Semble, that where carriers run a coach from A. to B. and back, notice that they limit their responsibility on the carriage of parcels from A. to B., is notice that they limit it likewise from B. to A.

CASE against the defendants as common carriers, for negligence in losing goods intrusted to them, to be safely conveyed by them from Kettering to London, and there to be delivered to the plaintiffs for reward to the defendants in that behalf. Plea, not guilty.

At the trial, before *Best, C. J.*, London sittings after Hilary term, 1828, it appeared that the plaintiffs were silk-weavers residing in London, and carrying on business there and at Kettering; that the defendants' coach ran from the George and Blue Boar, London, to Kettering and back; that at the George and Blue Boar there was a notice, that the proprietors of coaches which set out from that office would not be responsible for goods above the value of 5*l.*, unless entered as such, and paid for accord

ingly ; that the plaintiffs were aware of this notice, and in the habit of sending goods up and down by the defendant's coach ; that the goods in question, silks, to the value of about 46*l.*, were delivered to the defendants by the plaintiffs' servant, at the defendants' office at Kettering, to be conveyed to London, and that the servant saw no such notice in the office at Kettering ; that the goods were never delivered to the plaintiffs.

The learned Chief Justice, thinking the notice in the office at the George and Blue Boar, of which the plaintiffs were cognizant, applied only to the journey out to Kettering, and not to the journey back, a verdict was found for the plaintiffs, with leave for the defendants to move to set it aside.

*Andrews*, Serjt., obtained a rule nisi accordingly, in Easter term, on the ground that the plaintiffs, having an establishment at Kettering as well as in London, must be presumed to have known that the coach which came from Kettering was that which set out from the George and Blue Boar ; if so, they were bound by the contents of the notice at that office. In *Mayhew v. Eames*, 3 B. & C. 601, an agent employed by a commercial house in London to collect debts in the country, delivered a parcel containing bank-notes to a common carrier, to be forwarded to his principals in London ; which parcel was lost. The carriers had given notice that they would not be accountable for parcels containing bank-notes. The agent had no knowledge of such notice, but the principal had. It was holden, that it was their duty to have instructed their agent not to send bank-notes by that carrier, and that the latter was not responsible.

*Wilde*, Serjt., showed cause. In *Mayhew v. Eames*, the plaintiffs knew that the coach which brought their parcel from the country was the coach which started from an office in London, where the carrier's liability was limited by notice. There was no proof here that the plaintiffs knew that the coach from Kettering was the coach which started from the George and Blue Boar.

*Cur. adv. vult.*

BEST, C. J. In a state of society such as that we live in, — in which we are supplied with the necessaries and conveniences of life by an interchange of the produce of the soil and industry of every part of the world. — so much property must be intrusted to carriers, that it is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible ; and that they should be such as to provide for the safe conveyance of property, and at the same time protect the carrier against risks, the extent of which he cannot know, and, therefore, cannot determine what precautions are proper for his security.

Fearful of laying down any rule which might be injurious either to the public or to those most useful servants of the public, common carriers, we thought it right to avail ourselves of the leisure afforded us by the long vacation, to consider the cases of *Riley v. Horne* and *Macklin v. Waterhouse*.

When goods are delivered to a carrier, they are usually no longer under the eye of the owner ; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss ; his witnesses must be the carrier's ser-

vants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.

To give due security to property, the law has added to that responsibility of a carrier, which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer.

From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not — namely, the act of God and the King's enemies.

As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labor and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey is more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed, and which offer less temptation to dishonesty. He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him.

By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers (whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole) always have the amount of what they are to answer for specified in the policy of insurance.

If the extent of risk is ascertained in cases in which persons are not obliged to insure, and if they do insure may fix their own rate of premium, there is greater reason for ascertaining it where one is compelled to become an insurer, and can only charge what the magistrates in sessions, if they think proper to settle the rates of carriage, will allow under the statute of William and Mary, and where no such rates are made, what a jury shall think reasonable. It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel in which the value of the parcel should be specified, as well as the price to be paid for the carriage. But it would add very little to the labor of the book-keeper if he entered the value of each package, and gave the person who brought it a written memorandum of such entry, like the slips now made on an agreement for a policy of insurance.

The giving of such memorandums would entirely put an end to the litigation which the notices of carriers now give occasion to, and would make the practice of carriers, as nearly as circumstances will permit, conformable to that of all other insurers. Perhaps such memoranda might bring the parties within the reach of the stamp laws; and the apprehension of this may have prevented carriers from adopting a practice so effectual

for their security, and have driven them to the expedient of giving notices that they will not be answerable beyond a certain sum, unless the parcels are entered and paid for as parcels of value.

In *Batson v. Donovan*, 4 B. & A. 21, the Court of King's Bench considered a notice of this sort, the knowledge of which was brought home to the party sending goods, as equivalent to a request on the part of the carrier to know the value, and that it made it the duty of the owner of the goods to apprise the carrier that the parcel was of value.

The legislature would probably think, if its attention were called to the subject, that a stamp duty on contracts relative to inland carriage would be a very heavy and very inconvenient tax, and would remove the objection to written evidence of such contracts.

A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value. It is the interest of the owner of goods to give a true account of their value to a carrier, as in the event of a loss he cannot recover more than the amount of what he has told the carrier they were worth; and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier.

It was decided in *Gibbons v. Paynton*, 4 Burr. 2298, that any artifice made use of to induce a carrier to think that a parcel of jewelry contained only things of small value, would prevent the owner from recovering for the loss of his parcel.

In *Kenrig v. Eggleston*, Al. 93, it was held that the owner was not required to state all the contents of the parcel, but it was for the carriers to make a special acceptance. In *Tyly and Others v. Morrice*, Carth. 485, in which the preceding case is recognized and confirmed, it is said that the true principle is, that the carrier is only liable for what he is fairly told of. In *Titchburne v. White*, Str. 145, it was determined that a carrier is answerable for money, although he was not told that the box delivered to him contained any money, unless he was told that the box did *not* contain money, or he accepted it on the condition that it did not contain money.

It may be collected from these authorities, that it is the duty of the carrier to inquire of the owner as to the value of his goods, and if he neglects to make such inquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is responsible for the full value of the goods, however great it may be. This is a convenient rule; it imposes no difficulty on the carrier. He knows his own business, and the laws relative to it. Many persons, who have occasion to send their goods by carriers, are entirely ignorant of what they ought to do to insure their goods. Justice and policy require that the carriers should be obliged to tell them what they should do.

Although a carrier may prove that the owner of goods knew that the carrier had limited his responsibility by a sufficient notice, yet if a loss be occasioned by gross negligence, the notice will not protect him. Every man that undertakes for a reward to do any service, obliges himself to use due diligence in the performance of that service. Independently of his responsibility as an insurer, a carrier is liable for gross negligence. This point is settled by *Sleat v. Fagg*, 5 B. & A. 342; *Wright v. Stull*, Id. 350;

*Birkett v. Willan*, 2 B. & A. 356; *Beck v. Evans*, 16 East, 244; and *Bodenham v. Bennett*, 4 Price, 31.

The jury are to decide what is gross negligence. We may, however, observe, that the most anxiously-attentive person may slip into inadvertence or want of caution. Such a slip would be negligence, but not such a degree of negligence as would deprive a carrier of the protection of his notice. The notice will protect him, unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of.

If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it tells the owner of the goods that the carrier by whom he proposes to send them will not undertake for their safe conveyance, unless paid a premium proportioned to their value.

We have established these points, — that a carrier is an insurer of the goods which he carries; that he is obliged, for a reasonable reward, to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask this information, or if, when he asks, and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility, as an insurer, by notice; but that a notice will not protect him against the consequences of a loss by gross negligence.

Let us see how these principles bear on the two cases now under our consideration.

In *Macklin v. Waterhouse*, the notice was in these words: "Take notice, that the proprietor of this office will not be answerable for any parcels or packages above the value of 5*l.*, unless entered as such and paid for accordingly." A Mr. Weeks was the keeper of this office, at which parcels were received and booked for several coaches, belonging to different proprietors. No evidence was given that Weeks, the proprietor of the office, was the same Weeks who was one of the defendants, or that the plaintiff or his agent knew that the office-keeper had any interest in this coach.

No one can collect from the notice that the proprietor of the office has any thing to do with any of the coaches that take parcels from that office. If he had by his notice told those who had occasion to go to his office, that none of the proprietors of coaches who took parcels from it would be responsible, such a notice would have been sufficient. The persons who carry parcels to coach-offices are generally servants, and other persons who cannot have much knowledge of matters of this sort. The notice should be plain and easily understood by such persons. They are not to be required to determine whether a notice given by the keeper of a coach-office must apply to the risks undertaken by all the coach-proprietors whose coaches are loaded from that office. This is a case without a sufficient notice, and the defendants are subject to the unlimited responsibility of common carriers. It is not necessary to decide in this case whether, if it had been known that Weeks was a proprietor of the coach, a notice given as a proprietor of the office could form a special condition of his contract as a coach-proprietor.

This is an answer to the point made at the trial, that the notice in this case should have been stated in the declaration, for as there was no sufficient notice, it is the same as if there was no notice.

But it was said, that the declaration stated, that the loss was through the negligence of the defendant, and that there was no proof of any negligence. Probably not sufficient proof of gross negligence. But, as there was no notice, the allegation of loss by negligence is not a material allegation, and no proof of it was necessary. If, however, any proof of such allegation was necessary, a loss, the cause of which is not shown, is sufficient evidence of simple negligence, although not of gross negligence.

But the book-keeper deposed to a conversation with the servant who brought the parcel, which this servant did not contradict; but merely said, that she did not recollect it. It was not considered at the trial that what passed in this conversation limited the responsibility of the defendant. I did not, therefore, put it to the jury to say whether they believed that a conversation to the effect deposed to had passed. The book-keeper swore, that the woman who brought the parcel said, "that it was a parcel of consequence." That he asked her if it was a parcel of value; she said that it was, but that she did not know what its value was. The book-keeper told her it "ought to be insured." These were the words used by the witness. To talk of insurance to a country servant was not the way to inform her what it was proper for her to do. This agent of the defendants' should have told her, when she said she did not know the value of the parcel, to go back to her master and ask him what the value of his parcel was, that the agent might know what to charge him for the carriage of it; and that, until he knew the risk which his employers were to be answerable for, he would not take charge of the parcel. Instead of this, he takes it, and it is lost, and it was the only parcel that was lost. That I might conform to the opinion of the majority of the Court in *Batson v. Donovan*, I asked the jury whether the agent of the plaintiff had been guilty of any negligence, or failed in her duty to the carriers. They answered in the negative, and I think their answer was the proper one. As the carrier took the parcel without requiring to know its value, and without insisting that it should be entered and paid for according to its value, he took it without any limitation of his common-law responsibility, and must be answerable for its loss.

It is unnecessary for us to decide whether the intrusting valuable property to a servant, of whom the carrier chose to give no account at the trial, was sufficient to authorize the jury to find that the carrier had been guilty of that degree of negligence which would deprive him of the protection of a proper notice.

In *Riley v. Horne*, I was of opinion, at the trial, that the notice did not apply to the journey to London. The Court of King's Bench has determined that such a notice applies to the journey back as well as to the journey out.

A carriage that returns to a place must have gone from it, and, therefore, a notice from the proprietors of coaches going from a place may be applied to their return journey.

But to give effect to such a notice in the present instance, it must be proved that the person who sent goods on that same journey knew that the coach came from the George and Blue Boar in London. In this case,

the plaintiffs had establishments in the country and in London, and were constantly in the habit of sending parcels from London to the country, and from the country to London, by this coach. It is most probable, therefore, that the jury would have found that the plaintiffs knew that the carriage came from the George and Blue Boar, and that this notice applied to its journey out and home. As I thought that the notice was not so plain and direct as it ought to have been, I did not, therefore, leave it to the jury to say, whether the plaintiffs knew that the coach was one that started from the George and Blue Boar.

There ought to be a new trial in this case, that this question may be put to the jury.

In *Macklin v. Waterhouse*, the rule must be discharged, and in *Riley v. Horne* there must be a new trial.



### LANGSTON v. POLE and Others. — p. 228.

Devise to J. H. L. (devisor's eldest son) for life; remainder to trustees to preserve, &c.; remainder to J. H. L.'s second, third, fourth, fifth, and all and every other the son and sons of the body of J. H. L. severally and successively in seniority of age in tail male; remainder to devisor's second and other sons successively in tail male; remainder to first and other daughters of the body of J. H. L. successively in tail general; remainder to devisor's eldest daughter, M. S. L., for life; remainder to trustees to preserve, &c.; remainder to her first and other sons successively in tail male; remainder to her first and other daughters successively in tail general; like remainders for life (with remainders to trustees to preserve, &c.) to devisor's other daughters successively, with like remainders in tail to their respective children; remainder to devisor's sister in fee; various terms to trustees to raise money; and a power to the party in possession of the premises devised, to charge them for the portions and maintenance of younger children, male and female, accompanied with a provision, that in case of any younger child's obtaining a portion, and afterwards becoming entitled to the premises devised, the portion of such younger child should go over to the other younger children: Held, that the eldest son of J. H. L. took an estate tail in the premises expectant on the death of J. H. L.

THE following case was sent from the Court of Chancery for the opinion of this Court:

John Langston, Esq., was at the time of making his will, hereinafter mentioned, and at the time of his death, seised in fee-simple of divers manors, messuages, lands, tenements, and hereditaments situated in the counties of Oxford and Middlesex; and duly made and published his last will and testament in writing, bearing date the 28th day of July, 1801, which was executed and attested in manner by law required to pass freehold estates by devise, and he thereby gave and devised all his manors, messuages, farms, lands, tenements, and hereditaments, situated and being in the several counties of Oxford and Middlesex, or elsewhere in England, (except his shares in the New River Company,) unto John Pollexfen Bastard, Esq., John William Hope, Esq., and Charles Morice Pole, Esq., (now Sir Charles Morice Pole, Bart.,) their heirs and assigns, to the uses after mentioned; (that is to say,) to the use of the said testator's son, the said plaintiff, James Houghton Langston, for and during the term of his natural life, without impeachment of waste; — and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of certain trustees therein named, and their heirs during the life of the said plaintiff, in trust, by the usual ways and means to preserve the



contingent uses and estates thereafter limited ; — with remainder to the use of the second, third, fourth, fifth, and all and every other the *son and sons* of the body of the said *plaintiff* lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age or priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body to be always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing ; — with remainder to the use of the said *testator's* second and other sons successively in tail male ; — with remainder to the use of certain other trustees therein named, their executors, administrators, and assigns, for the term of 500 years upon the trusts and for the interests and purposes thereafter mentioned ; — with remainder to the use of the first, second, third, fourth, fifth, and all and every other the *daughter* and daughters of the body of the said *plaintiff* lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing ; — and for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns, for and during the term of ninety-nine years, upon the trusts and for the intents and purposes thereafter mentioned ; — with remainder to the use of the said *testator's* eldest daughter, Maria Sarah Langston, and her assigns for and during the term of her natural life, without impeachment of waste ; — and from and after the determination of that estate by forfeiture in her lifetime, to the use of the trustees thereafter named for preserving contingent remainders and their heirs during the life of her the said *testator's* said daughter, in trust by the usual ways and means to preserve the contingent uses and estates thereafter limited ; — with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of her the said *testator's* said daughter lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body to be always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing ; — and for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns for the term of six hundred years, upon the trusts and for the intents and purposes thereafter mentioned ; — with remainder to the use of the first, second, third, fourth, fifth and all and every other the daughter and daughters of the body of her the said *testator's* said daughter Maria-Sarah lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger

of such daughter and daughters and the heirs of her and their body and bodies issuing ; — and for default of such issue, like remainders with like attendant terms to testator's daughters Elizabeth-Catharine, Caroline, Agatha-Maria-Sophia, Henrietta-Maria, and their issue respectively ; — remainder to sixth and other daughters thereafter to be born, successively in tail general ; — remainder to trustees for term of 1500 years on trusts thereafter mentioned ; — remainder to the use of testator's sister, Sarah, the wife of Peter Cazalet, her heirs and assigns forever :

And the said testator by his said will did declare that as for and concerning the said term of 500 years by his said will limited as aforesaid, the same term was limited unto the said trustees thereof, their executors, administrators, and assigns, upon trust that in case there should be no son of the body of the said plaintiff, James Houghton Langston, nor any future son of his the said testator's own body, or there being any such son or sons if he and they should all die without issue male before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of his (the said testator's) said son, the said plaintiff, James Houghton Langston, then they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor should, after the decease of his (the said testator's) said son, the said plaintiff, James Houghton Langston, and such failure of issue male of his body, and of his the said testator's own body as aforesaid, by mortgage or sale or other disposition of all or any part of the premises comprised in the said term of 500 years, or by the rents and profits thereof, or by any other ways or means whatsoever, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters, (other than and besides an eldest or only daughter,) as thereafter mentioned ; (that is to say,) in case there should be but one such daughter, not being an eldest or only daughter, the full sum of 20,000*l.* for the portion of such one daughter to be paid to such one daughter at the age of twenty-one years or day of marriage, which should first happen after the commencement of the said term of 500 years in possession ; but if such only daughter should have attained such age or be married before such commencement, then to be paid to her immediately after such commencement : And if there should be two or more such younger daughters, then the sum of 40,000*l.* for the portions of such two or more of them, and to be paid and divided unto or between and among them, or any one or more of them, and to be payable at such days or times and in such parts, shares, and proportions, and subject to such provisos, conditions, and limitations over, (such limitations over to be for the benefit of some or one of them,) as he the said plaintiff, James Houghton Langston, at any time or times during his life, by any writing or writings with or without power of revocation and new appointment, sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto, signed in the presence of and attested by three or more credible witnesses, should direct or appoint ; and for want of such direction or appointment, to be paid to such two or more younger daughters, and to be shared and divided between and among them, and in equal parts, shares, and proportions, share and share alike :

Then, after specifying the times and mode of payment, it was provided always, that if any such younger daughter should depart this life, or be-

the term related ; or there being any such son or sons, if he and they should die without issue male before twenty-one, and there should be two or more daughters of the body of the daughter to whom the term related.

Under a sixth term, trustees were to raise 80,000*l.* for the testator's sister, Mary-Ann, wife of George Arnold, and his nephew, Houghton Okeover, in case there should be no son or daughter of all the testator's children, nor any future son or daughter of the testator's body, or, there being such, all should die without issue before they attained the age of twenty-one.

The plaintiff was empowered to jointure.

And the said testator thereby also provided and directed, that it should be lawful for the said plaintiff, from time to time, during his natural life, in case there should be any child or children of his body lawfully begotten, other than and besides an eldest or only son, by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, and published in the presence of, and attested by three or more credible witnesses, to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes, and hereditaments thereinbefore devised with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of the younger son or sons, or daughter or daughters of the body of him, the said plaintiff, lawfully to be or begotten, born in his lifetime, or within due time after his decease, to be paid and payable unto, and to vest in such younger son or sons, daughter or daughters respectively, at such time or times, and in such shares and proportions, with such clauses of survivorship, and in such manner as he, the said plaintiff, should by such deed or deeds, instrument or instruments in writing, or last will and testament, and to be executed and attested as aforesaid, direct, limit, and appoint ; and also to charge the same premises, or any part thereof, with or for the payment of any sum or sums of money yearly or otherwise, as he should think fit, for the maintenance of such younger son or sons, or daughter or daughters from the time of his death until such portion or portions respectively should become payable, not exceeding the interest of such portions after the rate of 4*l.* per cent. per annum.

And the said testator thereby further willed and directed, that in like manner it should be lawful for each of them, his said daughters thereinbefore named, to whom estates for life in his said devised estates were thereinbefore limited, when and as they should respectively be in the actual possession of his said devised estates, in case there should be any child or children of their respective bodies lawfully begotten, other than and besides an eldest or only son, by any such or the like deed or deeds, instrument or instruments in writing to be executed and attested as aforesaid, or by their respective last wills and testaments, or any writing or writings of appointment in the nature thereof, to be signed, sealed, and published as aforesaid, to charge all or any part of the said devised estates, with and for the raising and payment of any sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of their respective younger children : with the like power of providing maintenance, and limiting a term of years for raising the said portion or portions and maintenance, and in

such and the like manner, to all intents and purposes, as thereinbefore directed with respect to the portion or portions of the younger son and sons, and daughter and daughters of the said plaintiff, James Houghton Langston. And the said testator, by his said will, gave all the residue of his personal estate to the said plaintiff if and when he should attain the age of twenty-one years; but if he should die under that age, leaving a child or children, then to such child, or, if more than one, to such children equally; but if the said plaintiff should die under the age of twenty-one years, and there should be no son or daughter of his body living at the time of his death, then to the said testator's said daughters equally.

The said John Langston, the testator, departed this life in February, 1812, leaving the said plaintiff, James Houghton Langston, his only son and heir at law, (then a minor and a bachelor,) and the said testator's said several daughters him surviving, having previously made three codicils to his said will, but none of them in any manner affecting the above-mentioned limitations of his estate.

The said plaintiff, James Houghton Langston, attained the age of twenty-one years in May, 1817, and has since that time intermarried, and has issue by his wife two sons, viz., Henry Langston, his eldest son, and Edward Langston, his second son.

The testator had no son other than the said plaintiff, at or after the date of the said will.

The question for the opinion of the Court was, Whether the said Henry Langston, the first son of the said testator's son, the said James Houghton Langston, takes any, and what estate, under the said will.

*Taddy*, Serjt. The plaintiff's elder son Henry takes an estate tail, and that, either under the literal construction of this will, or according to the intention of the deviser, manifestly expressed in its various provisions.

First, under the literal construction. Estates tail are given to the plaintiff's second, third, fourth, fifth, and all and every other the son and sons of his body, severally, successively, and in remainder one after the other as they should be in seniority of age and priority of birth. If the elder son does not take the property, and take it first, the words "all and every the sons as they shall be in seniority of age" will be without operation; for it must be observed that the expression is "all and every other the sons," and not "all and every other the younger sons."

Then, the whole will is manifestly framed upon the supposition that the plaintiff's elder son was to be in possession of the estate. Provision is made for all the plaintiff's younger children, and even for the deviser's daughters, and the 25,000*l.* which the plaintiff, or the deviser's daughters in case they should succeed to the estate, are empowered to raise, is only to be raised in case there should be any child or children of their bodies, other than an elder or only son, and to be distributed among their younger children. But as the case stands at present, the plaintiff's second son will have the 25,000*l.*, and the landed estate too, while the plaintiff's elder son and his children will, unless he take the land under this devise, be left destitute.

Where the intention has been clear, the Courts have gone much farther than is requisite upon the present occasion, to give effect to such intention. In *Clements v. Paske*, cited in *Doe v. Hallett*, 1 M. & S. 130, upon a devise to A. for life, and, after his decease, to the first and eldest son of the body of his (the testator's) nephew, lawfully issuing or issued, and for default of such issue, then likewise to the second, third, and every other son of his nephew successively, and in remainder one after another as they should be

in seniority of age, and the several and respective heirs male of the body of every such second, third, and every other son or sons, the eldest of such sons and the heirs male of his body being always preferred before the younger, it was decided that the nephew took an estate tail by implication, in order to effectuate the general intent, and let in the descendants of the first son. So, in *Doe v. Hallett*, upon a devise to the use of A., only surviving son of J. S., for life, and to his first and other sons, &c., and for default of such issue, to the use of the first, second, and of all and every other son and sons of J. S., lawfully to be begotten, and the heirs male of the body of such first and other sons, with proviso that the said A. and his first and other sons, and also the first and other sons thereafter to be born of the said J. S., should reside at the family house, &c., it was held, that the second son of J. S. born before the date of the will, should take upon the death of A. without issue. In *Duke v. Doidge*, 2 Ves. 203, n., a younger son was permitted to take as an elder, and in *Beale v. Beale*, 1 P. Wms. 245, an elder daughter, where there was a son, was permitted to take as a younger child.

*Wilde*, Serjt., contra. The plaintiff's elder son takes no estate, or if any, takes it after the fifth son.

Nothing can be collected as to the deviser's general intention, for the will is altogether capricious, and not drawn up on any usual or consistent plan. For example, a larger estate is given to the daughters of daughters than to the sons of daughters; and the daughters of daughters take before the daughters of sons. The language of the will, however, is perfectly clear, there is no ambiguity latent or patent, and the Court must give effect to the words as they stand. There is nothing in the will to lead the Court to suppose that the plaintiff's elder son was not designedly omitted; as for instance, on the ground that family settlements existed, securing him a fortune from some other quarter. In *Doe v. Hallett* there was a latent ambiguity, and in *Clements v. Paske*, the nephew took an estate tail in order to effectuate the deviser's general intent; but an estate can only be implied in the absence of an express provision, or where there is any ambiguity; and though the Court may by implication extend an estate, they cannot insert the name of an individual expressly omitted by the deviser.

But, at all events, the plaintiff's elder son can only take after the fifth. The words severally and successively as they shall be in seniority of age, cannot apply to the second, third, fourth, and fifth sons, because their order of succession is previously and precisely designated; it can only apply, therefore, to all and every the sons other than the second, third, fourth and fifth.

*Cur. adv. vult.*

The following certificate was afterwards given:

We have heard this case argued by counsel, and have considered the same, and are of opinion that the said Henry Langston, the first son of the testator's son, the said James Houghton Langston, takes an estate in tail-male under the said will, expectant on the death of his father, the said James Houghton Langston.

W. D. BEST.  
J. A. PARK.  
J. BURROUGH.  
S. GASELEE.

28th November, 1828.

RAGGETT v. BEATY. — p. 243.

Devise, that J. B., a trustee for deviser, shall grant the premises to J. B.'s son G. B., to enter on after the death of J. B., and that J. B. and G. B. shall within one month after deviser's decease pay 100*l.* to W. T. and T. B. to discharge legacies, and if they omit

to do so, that W. T. and T. B. shall let the premises and raise the 100*l.* out of the rent, they keeping the deeds of the premises, and not allowing J. B. and G. B. to sell or mortgage till the legacies be paid and G. B. be twenty-one years of age; and that if G. B. die and leave no child lawfully begotten of his own body, W. T. and T. B. shall sell the premises and divide the proceeds among brothers, &c.: Held, an estate-tail in G. B.

THIS was a case directed by the Master of the Rolls for the opinion of the Court of Common Pleas on the hearing of a cause instituted by the assignees of George Blair, a bankrupt, to compel the specific performance of an agreement entered into by the defendant for the purchase of an estate sold under the commission.

The property was devised to the bankrupt by the will of his great-uncle, George Blair, deceased, which was as follows:—

“I, George Blair, of Milholm, in the parish of Stapleton, in the county of Cumberland, do make this my last will and testament in manner and form following: (that is to say,) Whereas in and by declaration of trust made between my nephew John Blair, of Greensburn, and me, bearing date the first day of March, 1766, touching and concerning all my messuage and tenement, situate, lying, and being at Souter Moor, otherwise Milholm, in the said parish of Stapleton, in the county aforesaid, it is, amongst other things, declared in trust, that he, the said J. Blair, or his heirs, do and shall convey, assign, and surrender the said messuage and tenement, with all and every the appurtenances, unto such person and persons, and for such estate, uses, intents, and purposes, and in such parts, manner, and form, with or without power of revocation, as I, the said George Blair, shall, from time to time, by any writing or writings, or by my last will and testament in writing, or any writing purporting to be my last will and testament, to be by me made and published in the presence of three or more credible witnesses, direct, limit, or appoint, give, devise, or assign the same; now it is my will, and I do hereby order, that he, my said nephew, John Blair, give, grant, and assign the said premises to his second son, George Blair, to enter upon and possess the same after the decease of his father, the said J. Blair. And I do further order and direct, that the said J. Blair and George Blair shall and will pay or cause to be paid, within one year next after my decease, 100*l.* of lawful money into the hands of my trusty and well-beloved friends William Taylor, of Hetherside, in the parish of Kirkclinton and county of Cumberland, yeoman, and Thomas Blair, of Barclose, in the parish of Scaleby and county aforesaid, yeoman, for them to discharge and pay the legacies hereinafter bequeathed. But if, and in case the said John Blair and George Blair do not pay the said sum of 100*l.* within the time limited, it is my will, and I do hereby order, that the said W. Taylor and Thomas Blair do let the said messuage and tenement, and receive the rents arising from the same until the said 100*l.* be paid, they keeping possession of all the deeds of the estate, and not allowing the said J. Blair and G. Blair either to sell or mortgage any part of the premises until the legacies be all paid, and G. Blair be twenty-one years of age; or if, and in case the said G. Blair die and leave no child lawfully begotten of his own body, it is my will that the said W. Taylor and T. Blair, their heirs and assigns, do sell the said messuage and tenement, and distribute the money arising from such sale amongst his brothers and sisters, and Jonathan Blair, and Hannah Todd, or their heirs, in such share or shares as they, the said trustees, shall think proper.”

The question for the opinion of the Court of Common Pleas was, What estate and interest, under this will, George Blair, the bankrupt, the son of John Blair, had in the said premises upon the death of his father John Blair.

*Wilde, Serjt.* The bankrupt took an estate tail under the will of the testator; with a contingent remainder over to the trustees named in the will, upon failure of issue by G. Blair. The rule of law is clear, that if a limitation can take effect as a remainder, it shall not operate as an executory devise; *Purefoy v. Rogers*, 2 Saund. 380, *Walter v. Drew*, 1 Com. 372, *Goodtitle v. Billington*, Dougl. 758; and the language of this will is sufficient to create an estate tail with a contingent remainder over. The words "in case the said George Blair die and leave no child lawfully begotten of his own body," allude to an ultimate indefinite failure of issue of G. Blair, and not to the failure of his immediate offspring at the time of his death. The rule to be extracted from the decisions on this subject is, that where lands of inheritance are devised to one, or to one and his heirs, and if he die without issue (or any words to that effect) then over, the latter words are supposed to be inserted in favour of the issue, and they either reduce or enlarge the estate previously given, to an estate tail.

The expressions, "if he die without issue," or "if he die and leave no issue," or "leave no issue of his body," or "leave no child or children," or "die without leaving any child or issue lawfully begotten or to be begotten," have all been decided to intend an indefinite failure of issue, and, consequently, to give an estate tail. If the words had been, "in case the said George Blair die and leave no children lawfully begotten of his own body, living at his death," they must have been construed as alluding to a failure of George Blair's immediate offspring at his decease, and he would then have taken an estate in fee with an executory devise over; but as there are no words that can fairly be construed to restrain the event of the failure of his issue, to the period of the death of George Blair, the devise must be considered as giving him an estate tail general, with remainder over in case of an ultimate indefinite failure of his issue: *Walter v. Drew*. In *Dansey v. Griffith*, 4 M. & S. 61, Richard Dansey, the plaintiff's father, being seised in fee, devised to his eldest son D. R. Dansey, and his heirs for ever, all his estates, lands, &c., and all his personal property, to enable him to pay all his debts and legacies; but if it should so happen that his eldest son D. R. Dansey should die and leave no issue, then he gave all his aforesaid estates and lands, &c., unto his son William Dansey and his heirs; and if he should die without issue, then to his son E. C. Dansey; and in the like case to his son S. Dansey; and in failure of issue from him, to the eldest surviving son of his sister Mary Johnson, and his heirs, &c. The Court were of opinion that D. R. Dansey took an estate in tail general. So, in *Forth v. Chapman*, 1 P. W. 663, where a testator, being possessed of a term, devised it to A. and B., and if either of them should depart this life and leave no issue of their respective bodies, then to C., it was held that these words, if used in a devise of freehold property, would imply an indefinite failure of issue: and this is confirmed by *Tenny v. Agar*, 12 East, 253.

In all the cases where words like the present have received a different construction, that construction has been adopted, because the other provisions of the will were such, that the testator's intention could not be carried into effect in any other way. But giving George Blair an estate tail, and the trustees a contingent remainder, will not in any way defeat the testator's intentions; for it is not necessary that executors or trustees should take in fee, unless they have charges which they could not defray with a less estate; here the charge of the debts and legacies might be defrayed out of a less estate: the devisees were, indeed, to be prevented from selling if they did not pay; but that must mean, if they did not pay out of the rents, as the trustees were to do in case of their omission. Such a charge would not pre-

vent the estate from being an estate tail. *Dutton v. Engram*, Cro. Jac. 427, *Denn v. Slater*, 5 T. R. 335. In *Goodtitle v. Maddern*, 4 East, 499, the charge was on the person of the devisee. The provision that the trustees shall hold the title deeds, and prevent George Blair from selling till he attains twenty-one, is not incompatible with a devise of an estate tail.

*Cross*, Serjt., contra. George Blair took an estate in fee with an executory devise over, in fee, to William Taylor and Thomas Blair. This is the testator's intention, as it is to be collected from the whole will. The circumstance of his restraining the sale of the estate till 100*l.* should have been paid, and George Blair should have attained twenty-one, shows that, subject to that restriction, he intended that John and George Blair together, or George Blair as survivor, should have the ability to sell the estate; but this they would not have unless George Blair took a fee. This construction is further borne out by the circumstance, that no interest in the property is limited to any one after George Blair, for the trustees take a power only, and not an interest. But, at all events, as George Blair was not to have the absolute disposal of the land till he had paid the 100*l.* mentioned in the will, and as the will is imperative on that head (shall and do pay 100*l.*.) the payment must be taken as the condition of the devise, and a devise on payment of a sum in gross has always been holden to pass a fee. *Collier's case*, 6 Rep. 16 *a*, *Wellock v. Hamond*, Cro. Eliz. 204, *Hawker v. Buckland*, 2 Vern. 105, *Doe d. Willey v. Holmes*, 8 T. R. 1, *Doe d. Palmer and Others v. Richards*, 3 T. R. 356. *Cur. adv. vult.*

The following certificate was afterwards sent : —

We have heard this case argued by counsel, and have considered the same, and are of opinion that the said George Blair, the son of John Blair, under the circumstances aforesaid, had an estate-tail in the said premises upon the death of his father, the said John Blair.

28th November, 1828.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

#### DUVERGIER v. FELLOWS. — p. 248.

Debt on bond, conditioned for paying plaintiff 10,000*l.*, upon his forming a company, and procuring purchasers for 9000 shares therein; such company to carry on a distillery according to a process for which a patent had been granted.

Plea, that the patent contained a proviso, rendering it void if transferred to more than five; that it was intended the said company should consist of more than five, and be formed for the purpose of enjoying the benefit of the letters patent, of acting as a corporate body, and dividing the benefit of the patent into 10,000 shares, transferable and assignable without charter from the king; and that it was corruptly and illegally agreed between the parties, that the plaintiff should form the company for such purposes, and should sell the 9000 shares in order to raise a larger sum of money, under pretence of carrying on the privilege granted by the patent :  
Held, a bar to the action.

DEBT on the joint and several bond of the defendant, Jean Jacques Saint Mare and others, the condition of which, as set out on oyer, appeared to be as follows : — “ Whereas the said Jean Jacques Saint Mare, some time since, obtained three several letters patent for the distillation of potatoes; and whereas the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows are now engaged in copartnership together in carrying on a certain distillery to a very large extent at Vauxhall, called the Belmont Distillery, according to the system and method of distilling, for the use and exercise of which the said several letters patent were granted to the said Jean Jacques Saint Mare, and which



said distillery has been erected, set up, and established on certain leasehold premises belonging to them, the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows; and whereas the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows have it in contemplation to dispose of their shares and interest of, in, and to the said several patents, and of, in, and to the distillery, premises, plant, and stock in trade in and upon the same, and to part with the same to a company to be formed for that purpose; and whereas the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows have applied to and requested Aime Duvergier to exert his influence amongst his numerous connections and friends, so as to form such company, intended to be called "The Patent Distillery Company," who shall appoint directors and trustees for the conduct and management of the said concern, which directors shall issue, under their hands and seals, 10,000 shares of the value of 50*l.* each share; and whereas the said Aime Duvergier, in consequence of his connection with different merchants, brokers, traders, and others in the city of London, hath consented and agreed to form the said company, to be called the "The Patent Distillery Company," among his own immediate connections and friends, and to bring such persons together for the purpose of appointing directors and trustees for the government and management of such distillery concern, and to procure purchasers for 9000 shares, of the value of 50*l.* each share; and whereas the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows, in order to induce the said Aime Duvergier to take the trouble of forming such company, and to use his influence amongst his connections and friends, and to indemnify him from the charges and expenses that he may be put to in and about the same, have proposed and agreed, as soon as he or his executors or administrators shall have effected such object, and procured purchasers for 9000 of such 50*l.* shares, and obtained for such company the first call upon such shares of 5*l.* each, that they, the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows, their heirs, executors, or administrators, or some or one of them, shall and will pay to the said Aime Duvergier, his executors, administrators, or assigns, the full sum of 10,000*l.* sterling, by three equal payments or instalments of 3333*l.* 6*s.* 8*d.*, viz., the sum of 3333*l.* 6*s.* 8*d.* so soon as the first instalment on such 9000 shares shall have been paid, the sum of 3333*l.* 6*s.* 8*d.* so soon as the second instalment on the same shares shall have been paid, and the remaining sum of 3333*l.* 6*s.* 8*d.* so soon as the third instalment of the same shares shall have been paid; now, therefore, the condition of the above-written bond or obligation is such, that if the above-bounden Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows, their executors or administrators, or any or either of them, do and shall well and truly pay or cause to be paid unto the above-named Aime Duvergier, his executors, administrators, or assigns, the full sum of 10,000*l.* of lawful money of Great Britain, in manner following, that is to say, the sum of 3333*l.* 6*s.* 8*d.*, part thereof, on the said Aime Duvergier, his executors or administrators, forming the said before-mentioned company, and procuring purchasers for such 9000 shares, and payment of the first instalment or call thereon; the further sum of 3333*l.* 6*s.* 8*d.* on the second instalment on such shares having been paid; and the remaining sum of 3333*l.* 6*s.* 8*d.* on the third instalment on the same shares having been paid; then the above-writ-

ten obligation to be void and of no effect, or else to be and remain in full force and virtue.

The defendant, after sundry pleas, on which issue in fact was taken, pleaded, fifthly, *actio non*, because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned, were letters patent of our sovereign lord the King, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster on a certain day, to wit, on the twentieth day of March, in the fifth year of the reign of our lord the King, whereby, after reciting, amongst other things, that the said Jean Jacques Saint Mare had, by his petition, humbly represented unto our said lord the King, that he was in possession of an invention of improvements in the process of an apparatus for distilling, our said lord the King gave and granted unto the said Jean Jacques Saint Mare, his executors, administrators, and assigns, his especial license, full power, sole privilege and authority, that he, the said Jean Jacques Saint Mare, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said Jean Jacques Saint Mare, his executors, administrators, or assigns, should at any time agree with, and no other, from time to time, and at all times thereafter, during the term of years therein expressed, should, and lawfully might, make, use, exercise, and vend the said invention within that part of the United Kingdom of Great Britain and Ireland called England, our said lord the King's dominion of Wales, and town of Berwick-upon-Tweed, in such manner as to him, the said Jean Jacques Saint Mare, his executors, administrators, and assigns, or any of them, should in his or their discretion seem meet, and that he, the said Jean Jacques Saint Mare, his executors, administrators, and assigns, should and lawfully might, have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein mentioned; to have, hold, exercise, and enjoy the said license, powers, privileges, and advantages thereinbefore granted or mentioned to be granted unto the said Jean Jacques Saint Mare, for and during and unto the full end and term of fourteen years from the date of the said last-mentioned letters patent next and immediately ensuing, and fully to be complete and ended according to the statute in such case made and provided: and it was by the said letters patent provided, and the same were declared to be upon the express condition that if the said Jean Jacques Saint Mare, his executors or administrators, or any person or persons who should or might at any time or times thereafter during the continuance of that grant, have or claim any right, title, or interest in law or equity of, in, or to the power, privilege, and authority of the sole use and benefit of the said invention thereby granted, should make any transfer or assignment, or any pretended transfer or assignment of the said liberty and privilege, or any share or shares of the benefit or profit thereof, or should declare any trust thereof to or for any number of persons exceeding the number of five, or should open, or cause to be opened, any book or books for public subscription to be made by any number of persons exceeding the number of five, in order to the raising any sum or sums of money under pretence of carrying on the said liberty or privilege thereby granted, or should by him or themselves, or his or their agents or ser-

vants, receive any sum or sums of money whatsoever, of any number of persons exceeding in the whole the number of five, for such or the like intents and purposes, or should presume to act as a corporate body, or should divide the benefit of the said last-mentioned letters patent, or the liberties and privileges thereby granted, unto any number of shares exceeding the number of five, or should commit or do, or procure to be committed or done, any act, matter, or thing whatsoever, during such time as such person or persons should have any right or title, either in law or equity, in or to the same premises, which would be contrary to the true intent and meaning of a certain act of parliament made in the sixth year of the reign of the late King George the First, intituled "An act for better securing certain powers and privileges intended to be granted by his Majesty by two charters for assurance of ships and merchandises at sea, and for lending money upon bottomry, and for restraining several extravagant and unwarrantable practices therein mentioned," or in case the said power, privilege, or authority should at any time thereafter become vested in, or in trust for more than the number of five persons or their representatives at any one time, reckoning executors or administrators as and for the single person whom they represent as to such interest as they were or should be entitled to in right of such their testator or intestate, that then and in any of the said cases those letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease and become void, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding; as by the said letters patent, which said letters patent the defendant brought into Court, might more fully appear: and the said defendant further said, that others of the said letters patent, in the said condition of the said writing obligatory mentioned, were and are certain letters patent of our said lord the King, under the seal of our said lord the King appointed by the Treaty of Union to be used instead of the grand seal of Scotland, bearing date on a certain day, to wit, the 26th day of February, in the 5th year aforesaid; by which last-mentioned letters patent our said lord the King gave and granted to the said Jean Jacques Saint Mare, his executors, administrators, and assigns, by themselves or such other person as he or they might appoint or agree with, and no others, from time to time and at all times thereafter, during the term of years in the said last-mentioned letters patent expressed, that they might lawfully make, use, exercise, and vend an invention therein mentioned, of improvements in the process of, and apparatus for, distilling, within that part of the United Kingdom of Great Britain and Ireland called Scotland, in such manner as to the said Jean Jacques Saint Mare, his executors, administrators, and assigns, or any of them, should in his discretion seem meet:

Then followed the extent and conditions of the Scotch patent, which were the same as in the patent for England.

And the said defendant further said, that the said several terms of fourteen years each in the said letters patent mentioned, at the time of the making of the said supposed writing obligatory, were, and yet are, unexpired, and that the said company, in the said condition of the said supposed writing obligatory mentioned, was meant and intended by the said Jean Jacques Saint Mare, the said plaintiff, and defendant, at the time of making of the said supposed writing obligatory, to consist of more than five persons, to wit, 10,000 persons, and to be formed for the

purposes, amongst other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said two several letters patent in the said condition, and in this plea mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the said United Kingdom called England, and in that part thereof called Scotland respectively, under color of the said letters patent respectively, to wit, at, &c., and so the defendant said, that the said supposed writing obligatory was and is void in law, and this the said defendant was ready to verify; wherefore, &c.

The defendant pleaded, sixthly, *actio non*, because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned were letters patent of our sovereign lord the now King, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, on a certain day, to wit, the 20th day of March, in the fifth year of the reign of our sovereign lord the King, containing the like matters and things, and the like proviso and to the same effect as the said letters patent in the said fifth plea first mentioned, as by the said letters patent which the said defendant produced to the Court might more fully appear; and the defendant further said, that the said term of fourteen years in the said last-mentioned letters patent mentioned, at the time of the making of the said supposed writing obligatory, was, and yet is, unexpired, and that the said company in the said condition of the said supposed writing obligatory mentioned was at the time of the making thereof intended by the said plaintiff and defendant to consist of more than five persons, to wit, 10,000 persons, and to be formed for the purpose, amongst other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the United Kingdom called England, under color of the said last-mentioned letters patent; by means of which premises in this plea mentioned the said supposed writing obligatory was and is wholly void, and this the said defendant was ready to verify, wherefore, &c.

The defendant pleaded, seventhly, and lastly, that certain of the said letters patent in the said condition of the said supposed writing obligatory mentioned were letters patent of our sovereign lord the now King, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, on a certain day, to wit, the 20th day of March, in the fifth year of the reign of our said lord the King, containing therein the like matters and things, and the like proviso, and to the same effect, as the said letters patent in the said fifth plea first mentioned, as by the said last-mentioned letters patent, which the said defendant produced to the Court, might more fully appear; and the defendant further said, that the said term of fourteen years in the said last-mentioned letters patent mentioned at the time of the making of the said supposed writing obligatory, was, and yet is, unexpired, and that the said company in the said condition of the said supposed writing obligatory mentioned was by the said Jean Jacques Saint Mare, the said Stamp Brooksbank, the said defendant, and the said plaintiff intended at the time of the making the said supposed writing obligatory to consist of more than five persons, and to be formed for the purpose, amongst other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the

use and benefit of the said persons so exceeding the number of five, in that part of the United Kingdom called England, under color of the said letters patent, and of the acting as a corporate body, and dividing the benefit of the said last-mentioned letters patent, and the liberties and privileges thereby granted, into divers shares, exceeding the number of five, to wit, 10,000 shares, to be transferable and assignable, without any charter from our lord the King, and that, before the time of the making of the said supposed writing obligatory, to wit, on, &c., at, &c., it was corruptly and illegally agreed, by and between the said plaintiff and the said Jean Jacques Saint Mare, the said Stamp Brooksbank and the said defendant, that the said plaintiff should form such company, as in this plea mentioned, for the purpose in this plea mentioned, and should sell and dispose of divers, to wit, 9000 of such shares as in this plea mentioned, being the shares in the said condition of the said supposed writing obligatory mentioned, and should cause divers large sums of money to be subscribed by public subscription by numbers of persons exceeding five, to wit, 9000 persons, in order to the raising a large sum of money, to wit, 450,000*l.*, under pretence of carrying on the said liberty or privilege (amongst other things) by the said last-mentioned letters patent granted; such money to be in part received by the said Jean Jacques Saint Mare, Stamp Brooksbank, and the said defendant, for the purpose of carrying on the said liberty and privilege for the benefit of the said last-mentioned persons, so exceeding five; and that the said Jean Jacques Saint Mare, the said Stamp Brooksbank, and the said defendant, should, in consideration thereof, pay to the said plaintiff the sum of 10,000*l.* of lawful money of Great Britain, in the manner in the said condition of the said supposed writing obligatory mentioned; and that for securing the payment of the sum of 10,000*l.* the said defendant should make and seal, and as his act and deed deliver to the said plaintiff a writing obligatory, in the penal sum of 10,200*l.*, conditioned for the payment of the said sum of 10,000*l.* in manner aforesaid: and the defendant further said, that in pursuance of the said corrupt and unlawful agreement, the said defendant afterwards, to wit, on, &c., at, &c., made and sealed, and as his act and deed delivered the said supposed writing obligatory in the said declaration mentioned, and the said plaintiff then and there accepted and received the same of and from the said defendant, upon the said corrupt and unlawful agreement: by means of which premises in this plea mentioned the said supposed writing obligatory was and is wholly void, and this the said defendant was ready to verify, wherefore, &c.

Demurrer inde, and joinder.

*Wilde*, Serjt., in support of the demurrer. The substance of the seventh plea (which comprehends also the matters contained in the fifth and sixth) is, that it was *intended* by the parties to do certain acts, and, among them, to form a company which should act as a corporate body, and should transfer and assign shares without charter from the crown.

But a mere allegation of intention is not sufficient to show that the bond was void, for the intention to commit an illegal act is not necessarily followed by commission. If such an allegation be sufficient, every existing corporation is open to the same objection, for there is none of which it may not be predicated that before becoming a corporation it intended to become a corporation. The intention, however, might be perfectly legal, for the parties might intend to become a corporation by procuring an act

of parliament for the purpose — a mode of becoming so, which is recognized in 6 G. 2, c. 18; and when the defendant might have obtained such an act himself, it is not for him to object that the plaintiff did not obtain it; therefore in *Haines v. Busk*, 5 Taunt. 521, where, in an action for brokerage, the defence was, that the voyage undertaken was illegal for want of a license, the Court held, that as the defendant ought to have procured the license, he should not take advantage of the want of it. Nor is it sufficiently shown that the acts intended were illegal. The defendant should have specified what the acts were, in order that the Court might judge whether they were acts peculiar to a corporate body or not. The defendant might have been in error in supposing that certain acts which he had in view were exclusively acts of a corporate body.

Acting as a corporate body, for instance, in private matters, would not render the parties liable to a quo warranto; as, in the matter of a warren; *Rex v. Cann*, Andr. 15. At all events, by making the allegation in this general way, the defendant offers matters of law to be tried by a jury. He ought to have afforded the plaintiff an opportunity of taking issue on the acts impugned, and on the means by which it might be proposed to justify them. The only act specified is, that it was intended the proposed company should transfer and assign shares without charter from the King. But there is nothing illegal in that. It might have been intended to transfer them under an act of parliament to be procured for the purpose; and even without that, the mere transfer would not be in itself illegal, but only a symptom that the body transferring was an illegal combination; *Rex v. Webb and Others*, 14 East, 406. The transfer would be legal, if the assignee took it subject to the original covenants; *Pratt v. Hutchinson*, 15 East, 511. A share in a partnership may be sold under an execution, and the assignees of a bankrupt may carry on his trade. At all events a partner may assign the whole of his interest, although it may depend on the terms of the partnership whether the assignee shall carry on business with the others or not.

In *Josephs v. Pebrer*, 3 B. & C. 639, where a contract for shares in a joint-stock company was held void, the company was formed; and the case was argued on the provisions of 6 G. 1, c. 18, which has since been repealed.

*Taddy*, Serjt., contra. The demurrer admits that it was intended the company should act as a corporate body, and should transfer shares without a charter from the crown; and that it was corruptly and illegally agreed between the plaintiff and the defendant that the plaintiff should form the company for those purposes. With such an admission, it would have been superfluous to have specified what particular acts of a corporate body the company was to perform; for if it was corruptly and illegally agreed, it could not have been intended that the company should act legally as a corporation.

But the allegation that it was intended the company should act as a corporate body is sufficiently explicit, without specifying particular acts. The courts take judicial notice of the functions and privileges of corporate bodies as enumerated in Com. Dig. Franch. F. 1. 9 Rep. 25, b. 10 Rep. 33, b.

Connecting the seventh plea with the condition in the bond and the patent, it is clear the transaction was illegal; even at common law.

The patent is declared on the face of it to be void, if, by any contrivance, assigned for the benefit of more than five persons: by the condition of the bond the plaintiff was to procure purchasers for 10,000 shares in the projected company, who were to conduct the process described in the patent: by that one act the patent would have become void, and the purchasers would have paid their money for nothing: upon the face of the plea the agreement appears to have been a manifest fraud on the public, and the agreement is therefore void, as being inconvenient and contrary to public policy, as the patent would also be, if attended with ill effects; 3 Inst. 184. But the extensive transfer of shares is of itself inconvenient and illegal. A chose in action cannot be transferred. That rule was originally established to prevent maintenance; Co. Lit. 214, a 266, a; and though maintenance be less dreaded in modern times, suitors who have to contend against the joint-stock purse of an opulent company are exposed to the effects of disparity of means not experienced in contests between individuals.

Notwithstanding the stat. 6 G. 1, c. 18, has been repealed, an agreement such as that described in this plea is illegal at common law, as tending to the prejudice and grievance of the King's subjects. "The necessary effect of such a practice (the transfer of shares) is to introduce gaming and rash speculation to a ruinous extent: in such transactions one cannot gain unless another loses; whereas in fair mercantile transactions each party, in the ordinary course of things, reaps a profit in his turn. In this case the association appears to be one of which the effect cannot but be mischievous." Per *Abbott, C. J.*, in *Josephs v. Pebrer*. In *Kinder v. Taylor*, (a) Lord *Eldon* threw some doubt upon *Rex v. Webb*; that case, he said, "was scanty in argument, and the common law was not considered in it, because it was an indictment upon the statute. He spoke with all respect of Lord *Ellenborough*, who had decided the case, and whose memory he venerated as a lawyer; but he should have been glad if his Lordship had taken the trouble to state what was assuming to act as a corporation. For many considerations, it would have been very fortunate, if the Court had then looked at this as a distinct question, and had been good enough to declare, 'This is not acting as a corporation, because to act as a corporation you must act so and so.' It now, however, became necessary to declare, either by legal judgment or by a declaratory act of parliament, what was the meaning of presuming to act as a corporation; and by whomsoever it was declared, not only what was doing, but what had been done, must be attentively regarded. was for this reason, he thought, that the *King v. Webb* called for further explanation." "His opinion might be of use to nobody, but it was as well that the world should know it:" "That opinion was, and he had taken some trouble to consider the question, that if it could satisfactorily be made out to a jury that a party was opening books, raising a premium upon the shares, and then took care to get himself out of the scrape, that was an indictable offence." Such a company is illegal, even when formed for useful purposes; as, for carrying on a private brewery; *Buck v. Buck*, 1 Camp. 547. And it cannot be argued that the plaintiff was ignorant of the proviso limiting the assignment of the patent to five, for the patent is referred to in the condition of the bond on which he sues.

(a) *George on Joint-Stock Companies*, p. 46, (called there, p. 44, the case of the *Real Del Monte Mining Company*.) Sweet, Chancery Lane, 1825.

If the transaction between him and the defendant had gone but a little further, it had been an indictable offence; *Rex v. Stratton and Others*, 1 Camp. 549.

*Wilde.* The clear intention of the parties was to find purchasers for the premises where the distillery was carried on, and for the business. The transfer of the patent was not the object of the transaction, but the transfer of the business, which could not be transferred without communicating a knowledge of the process by which it was carried on; and it was necessary that the assignees should by some means be protected against any charge of infringing the patent right of the assignor. There is nothing illegal in transferring shares in a business, subject to the original liabilities, and there was nothing in this business prejudicial to the public interests. But the transfer of shares, and the raising a capital by subscriptions, are in effect the only objections made by this plea against the intended company; and with regard to the latter, even under 6 G. 1, c. 18, Lord *Ellenborough* says, in *Rex v. Webb and Others*, "We think it impossible to say that it makes a substantive offence to raise a large capital by small subscriptions, without any regard to the nature and quality of the objects for which the capital is raised."

It nowhere appears in the pleadings that the plaintiff was aware of the proviso which rendered the patent void upon transfer to more than five, and there is no law which requires that such a proviso shall be inserted in a patent.

*Cur. adv. vult.*

*BEST, C. J.*, now delivered the judgment of the Court; and after reading the pleadings, and particularly adverting to the condition of the bond, and the terms of the patent, as set forth ante, p. 438, proceeded as follows:—

It appears from the condition of the bond that the plaintiff was not entitled to any part of the 10,000*l.*, which the obligors had bound themselves to pay him, until he had formed a company, and procured purchasers for 9000 shares, and payment of the first instalments or calls on those shares. The forming the company, the selling 9000 shares of what was to be called the stock of such company, and the prevailing on the purchasers to pay one third of their subscriptions, or 150,000*l.*, is a condition precedent to the plaintiff's right of action.

The proviso contained in the patent shows that the plaintiff cannot perform this condition without committing a fraud on a vast number of persons, and that if he could obtain any subscriptions, the subscribers would be entitled to recover back the money paid on them, as being obtained by fraud, or as money paid without consideration. The moment the company was formed, and the patents were transferred to them, they would cease to exist as legal patents, for they would be destroyed by any assignment to more than five persons, or to any persons in trust for more than five persons. The condition of the bond shows, that the patents were to be assigned to a company to be formed by subscription, and the shares in which were to be transferable. Any one of these circumstances would render the patents void. This difficulty was felt by the counsel for the plaintiff, and he attempted to extricate his client from it by insisting that it was not intended to convey the exclusive right of distilling spirits from potatoes, secured by the patent, but only to free the intended company from being liable to the patentee for using his invention. But it is clear from the terms of the bond that the object of



the parties was not to destroy the patents, but that they professed to assign the privilege granted by them to the company which the plaintiff was to form.

The words of the condition of the bond are, "have it in contemplation to dispose of their interest of, in, and to the several patents, and of, in, and to the premises and stock in trade, and to part with the same to a company." These terms indicate an intention not to destroy, but to transfer unimpaired the monopoly secured by the patents. But it has been said it does not appear from the pleadings that the plaintiff knew of this proviso in the patents, and that the insertion of such a proviso in patents is not required by any law. But we must presume that he knew the contents of the patents referred to by the bond on which he brings his action; of the patents which, it appears by the same bond, he undertakes the sale in the manner stated in that bond. Every man who undertakes to do a thing must be presumed to know what he undertakes, unless he can show that he has been deceived by the other party. How could he undertake to negotiate for the sale of the patents, unless he had seen them and knew their contents?

If the plaintiff knew the terms on which the patents were granted, he must know that what he undertook to do could not be done. As he cannot legally perform his part of the contract, he never can be in a condition to recover the compensation stipulated to be paid on its full and complete performance. There are some old authorities which say, that if a man binds himself by the condition of his bond to do what at the time he executed the bond it was impossible for him to do, the bond shall be considered as without condition, and the obligee may recover the penalty. These authorities are rather opposed to the plaintiff's claim; they apply only to cases where there is nothing to be done by the obligee; here the plaintiff must do something before the bond can be enforced. If what he is to do can never be legally done, the instrument must be inoperative. The plaintiff not having performed the first condition, can never have a right of action on it. The situation of the plaintiff in this case, is like that of the defendants in the cases alluded to. It is his fault that he has undertaken what he cannot perform. In *Pullerton v. Agnew*, 1 Salk. 172. Holt, C. J., said, "Where the condition is underwritten or indorsed, there that only is void, and the obligation is single; but where the condition is part of the lien itself, and incorporated therewith, if the condition be impossible, the obligation is void." In the case before us, the service of the plaintiff, and payment for it by the defendant, are incorporated together, and if the service cannot be performed, the whole instrument is a nullity.

But it is apparent from the facts disclosed by the condition of this bond and the patents, that the scheme in which the parties to this action were engaged was one of those bubbles by which, to the disgrace of the present age, a few projectors have obtained the money of a great number of ignorant and credulous persons, to the ruin of those dupes and their families, and by which a passion for gambling has been excited, that has been most injurious to commerce and to the morals of the people.

What any one must discover from reading the instruments, the parties to them must be fully informed of. It cannot be too well known, that there is no place for persons engaged in such transactions in courts appointed for the decision of civil causes. Although the statute of 6 G. 1 be repealed, the common law relating to such schemes is expressly

reserved by the repealing statute, and no one doubts, if it can be shown, as it easily may, that such schemes are fraud-traps, and injurious to the public welfare, that the forming of them is an indictable offence at the common law.

The seventh plea states, and the demurrer admits, that the plaintiff and the defendant intended that the company which the plaintiff undertook to form should act as a corporate body without any charter from the King, and that the benefit of the letters patent were to be enjoyed by this pretended corporate body, and that the capital of this body was to be divided into 10,000 shares, which were to be transferable and assignable.

It has been said at the bar, that the parties might intend to obtain an act of parliament to give this body a legal existence. Nothing of this intention appears on the record.

It has been further said, that the defendant should have shown how the parties intended to act as a corporation. If this is not correctly pleaded, advantage should have been taken of the technical defect by special demurrer. If what they intended to do would not have been acting as a corporation, they should have traversed the plea. By demurring, the plaintiff has confessed himself guilty of intending to form a company that was to act as a corporation.

But the shares were to be transferable. There can be no transferable shares of any stock except the stock of corporations, or of joint-stock companies created by acts of parliament. When it is said the shares were to be transferable, that must mean, that the assignee was to be placed in the precise situation that the assignor stood in before the assignment; that the assignee was to have all the rights of the assignor, and to take upon him all his liability. Now, the assignee can join in no action for a cause of action that accrued before the assignment. Such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will still remain liable for every debt contracted by the company before he ceased to be a member. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation, without the authority of an act of parliament. Such authority is expressly given by the bank acts, the South-Sea acts, and by other statutes creating companies that possessed stock, which it was deemed proper to be rendered transferable.

The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. But this is put only as one of the proofs of the intention of the projectors of this company that it should act as a corporation. It is not necessary on these pleadings to decide whether the forming a company with such shares is of itself, without other circumstances, pretending to act as a corporation; because it is by the pleadings distinctly admitted, that the plaintiff and defendant intended that the company should act as a corporation. Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the King, by usurping on his prerogative. By the 9th of Anne, c. 20, the Court may not only give judgment of ouster, but may fine a defendant convicted on a quo warranto. This shows that the usurpation is considered as a criminal act. But it has been insisted, that the usurpation is only criminal where a party, without authority, acts in a public office, and that the pretended corporation which these

parties were to set up did not affect the public, but was a scheme with which certain individuals only were connected. Most of the statutes relative to quo warrantos, from the statute of Gloucester down to the 9th of Anne inclusive, have the words *offices and franchises*. Franchises are privileges for the advantage of individuals. In Com. Dig. title Quo Warranto, many things are mentioned as matters for which quo warranto will lie, which are valuable only to the individuals who claim them against the crown, and are not connected with any public duty. But it concerns the public that bodies, composed of a great number of persons with large disposable capitals, should not be formed without the authority of the crown, and subject to such regulations as the King in his wisdom may deem necessary for the public security.

The acting as such a corporation, without charter from the crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporations. For these reasons, judgment must be for the defendant.

Judgment for defendant accordingly.

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SYMES v. ROSE. — p. 269.

Money paid into court under 7 & 8 G. 4, c. 71, to abide the event of a cause, is not paid out under a rule absolute in the first instance.

THE defendant having been arrested for 120*l.*, deposited that sum and 10*l.* more in the hands of the sheriff in lieu of bail, which sums, with 10*l.* more, were paid into Court to abide the event of the suit, under the 7 & 8 G. 4, c. 71, s. 2, by which it is enacted, that if in such case "judgment be given in the said action for the defendant, the said money so deposited or paid into Court shall, by order of the Court, upon motion to be made for that purpose, be repaid to such defendant."

Judgment having been given for the above defendant upon a verdict in her favour,

*Andrews*, Serjt., now moved for a rule absolute in the first instance, for repayment to the defendant of the money paid into Court as above, upon production of the *postea*; but

The Court, upon consulting its officers, and adverting to the possibility of a writ of error, granted a rule to show cause why the money should not be paid out to the defendant or her attorney, upon production of the certificate of the clerk of the judgments of judgment having been signed, and the prothonotary's certificate of the money having been paid in.

On a subsequent day the rule was made absolute on affidavit of service, and production of the certificate as above; the costs of the rule being allowed with the costs in the cause.

**CARRUTHERS v. PAYNE**, Assignee of **THOMPSON**, a Bankrupt.  
p. 270.

A chariot was built to plaintiff's order, and paid for by him: when finished in other respects, plaintiff ordered a front seat to be added; but the builder being slow in making this addition, plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. Plaintiff, being afterwards dissatisfied, ordered the chariot to be sold, and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignee seized the chariot: more than three months afterwards the plaintiff commenced his action:

Held, first, that the plaintiff had sufficient property to maintain trover; secondly, that the chariot did not pass to the assignee as being in the order and disposition of the bankrupt with the consent of the owner; and, thirdly, that the assignee was not within the protection of the forty-fourth section of 6 G. 4, c. 16, which limits actions to three months after the fact committed.

**TROVER** for a chariot. At the trial before *Best*, C. J., London sittings after Trinity term, it appeared that the chariot had been built to the plaintiff's order, and paid for by him. After it had been finished in other respects, the plaintiff directed a front seat to be added, but the builder being slow in the execution of this addition, the plaintiff sent for the chariot six or seven times, and the builder promised to deliver it. Subsequently, the plaintiff being dissatisfied, ordered the chariot to be sold, and it was, according to the custom of the trade in such cases, standing in the builder's warehouse for that purpose, the front seat not having been added, when a commission was sued out against him, and the chariot was seized by the assignee. The plaintiff commenced the present action more than three months after the seizure.

On the part of the defendant it was objected, first, that the chariot was unfinished, and that trover did not lie for an unfinished article; secondly, that the chariot was properly seized by the defendant as being in the order and disposition of the bankrupt, with consent of the true owner; and, thirdly, that under the forty-fourth section of 6 G. 4, c. 16, the action ought to have been commenced against the assignee within three months after the seizure.

A verdict having been given for the plaintiff, subject to the opinion of the Court upon these points,

*Taddy*, Serjt., moved to set it aside and enter a nonsuit. In support of the first objection, he cited *Mucklow v. Mangles*, 1 Taunt. 318 (recognised in *Woods v. Russell*, 5 B. & A. 942), where it was holden, that if a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him.

Then, the chariot being in the bankrupt's warehouse, where the plaintiff had suffered it to remain, and not being distinguishable from the bankrupt's property, must be taken to have been in his disposition with the consent of the owner. In *Knowles v. Horsfall*, 5 B. & A. 134, a spirit-merchant sold to a wine-merchant several casks of brandy, some of which, at the time of the sale, were in the spirit-merchant's own vaults, and others in the vaults of a regular warehouse-keeper: it was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. The vendee marked the several casks with his initials, and it was notorious to the persons carrying on the wine trade at the place, that this sale had been effected, but no notice of it had been given to the warehouse-keeper, with whom some of the casks were deposited. The spirit-merchant having become bankrupt while the brandies remained where they

originally were, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition by the consent and permission of the true owner, within the 21 Jac. 1, c. 19, s. 11. And in *Thackthwaite v. Cock*, 3 Taunt. 487, it was held, that a custom for purchasers of hops from hop-merchants to leave them in the merchant's warehouse for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. That case is not to be distinguished from the present.

But at all events the action is too late; for by 6 G. 4, c. 16, s. 44, "Every action brought against any person for anything done in pursuance of this act, shall be commenced within three calendar months next after the fact committed." The fact, for the redress of which this action is brought, is the conversion of the plaintiff's chariot by the defendant, and that conversion was complete by the act of seizure under the commission.

A rule nisi having been granted,  
*Wilde*, Serjt., showed cause.

The answer to the first objection is, that the chariot was in effect finished. The mere addition of a fore seat, after the article had been paid for, gives no more reason for calling it unfinished than the sending it to be repaired in any trifling particular. But in *Woods v. Russell*, where the defendant ordered a ship and paid for it by instalments as the building advanced, the builder having registered her in the defendant's name, the Court held the property to be vested in him, and not in the assignees of the builder, although he became bankrupt before the ship was finished, and even before she was launched. That case, therefore, goes farther than the present; and the bankrupt's receiving from the plaintiff the full price of the carriage after it had been built to his order, is as unequivocal an admission that the property was in the plaintiff as the registering of the ship in *Woods v. Russell*.

The second objection is answered by the fact that the plaintiff had sent for the chariot repeatedly, and the bankrupt had promised to deliver it. It was in the possession of the bankrupt, therefore, through his own procrastination, and not by the plaintiff's consent. In *Knowles v. Horsfall*, and *Thackthwaite v. Cock*, the goods were left in the possession of the bankrupt by the express agreement of the parties. Those cases, therefore, do not apply.

Then, the forty-fourth section of 6 G. 4, c. 16, applies only to actions brought against commissioners or other officers acting in the discharge of a public duty, and not to actions against assignees or others for the purpose of trying a disputed private claim. If it applied to assignees, the provision in the eighty-seventh section, which enacts that no title to property shall be impeached, unless the bankrupt shall have commenced proceedings to supersede the commission within a twelvemonth, would be altogether nugatory; for the usual mode of commencing such proceedings is by an action against the assignees. But the forty-fourth section is connected with the forty-first, forty-second, and forty-third (all of which apply exclusively to the commissioners), and is necessary to complete the protection afforded to them under the old law, 1 Jac. 1, c. 15, s. 16. The forty-first requires a month's notice to be given to the commissioner before proceeding against him; the forty-second enacts, that the plaintiff shall not recover unless he prove such notice at the trial; and refers to costs thereafter mentioned; the forty-third enables a commissioner to tender amends within one month after notice, and to plead the tender in bar; and the forty-fourth, by analogy to several statutes which protect public officers in other situations, limits the time for

bringing actions to three months; and the conclusive proof that the expression "any person" in that section has reference only to any of the commissioners or other officers described in the three preceding sections, is, the enactment that if judgment be given against the plaintiff the defendant shall recover double costs, the costs referred to in the forty-second section: an enactment, frequent and salutary as applied to the protection of officers performing a public duty, but unusual and oppressive as applied to parties contending about ordinary questions of property. Magistrates, officers, gaolers, and others have been protected by similar limitations. So, the treasurer of the West India Docks (under the words any person or persons), by the act relating to that establishment, 39 G. 3, c. 69, ss. 184, 185. He, however, is to all intents a public officer; bound to receive dues; responsible to the revenue; and not acting in such matters for his own benefit. But there is no instance of so short a limitation upon mere questions of property between individuals acting on their own account, as assignees do, who, for the most part, are creditors of the bankrupt.

*Taddy.* The plaintiff had contracted to have a chariot with a front seat: his only title to the chariot was by virtue of that contract. The chariot in question having no front seat, could not be the chariot for which he had contracted, and consequently he had not sufficient title in it to maintain trover. It is true, that in *Woods v. Russell*, the ship for which the defendant had contracted was not completely finished, but the builder had registered her at the custom-house in the name of the defendant, and the decision turned mainly upon the peculiar provisions of the register acts.

Then, secondly, the builder of the chariot was the true owner, and the chariot was in his order and disposition as such, until it was delivered pursuant to the contract. In *Knowles v. Horsfall*, although the purchaser had put his name on the casks he had purchased, and some of them had actually been delivered under the contract, the rest remaining in the possession of the vendor, were holden to pass to his assignees; and *Thackthwaite v. Cock* was decided on the same principle.

Lastly, if the forty-fourth section of 6 G. 4, c. 16, were not intended to apply to the acts of assignees, and all others as well as commissioners, there would have been no reason for employing only the word commissioners in ss. 41, 42, 43, and the expressions "every action, brought against any person, for any thing," in the forty-fourth; the difference in the form of expression could not be accidental. It is for the benefit of the whole body of creditors to extend such protection to assignees as well as commissioners; for so long as they continue liable to actions in their capacity of assignees, they cannot safely proceed to make any dividend, and ought, therefore, if not protected by this section, to wait six years for that purpose. The West India Dock act, 39 G. 3, c. 69, extends the protection of 24 G. 2, c. 44, (for rendering justices of peace more safe in the execution of their office) only to the mayor, aldermen, and justices specificatim. But the treasurer of the docks was holden, in *Wallace v. Smith*, 5 East, 114, to come within the protection of the further provision that "no action or suit shall be commenced against any person or persons for anything done in pursuance or under colour of this act, until fourteen days' notice shall be thereof given in writing, or after three calendar months next ensuing the time when the act or thing shall have been done for which such action shall be brought." And the treasurer in that case was acting in a private matter, which as much concerned his own interest and that of the company, as a seizure by the assignee of a bankrupt can concern the interests of himself and the other creditors. *Gaby v. The Wills and Berks Canal Company*, 3 M. & S. 580, shows that "the act done" means any tort for which a civil remedy

may be obtained ; and the words of 6 G. 4, c. 16, " the fact committed," do not admit of any other construction.

The eighty-seventh section of the statute applies only to cases where the commission has been superseded, and, therefore, is not incompatible with the construction which the defendant seeks to put on the forty-fourth.

BEST, C. J. Three objections have been taken to the verdict in this case ; and the first is, that under the circumstances the plaintiff could not maintain trover. If the article in dispute had rested as it was immediately after the bargain, perhaps there might be ground for the objection, and the case might fall within the principle of the decision in *Mucklow v. Mangles* ; where *Heath, J.*, said, " A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another : if the first customer has other goods made for him within the stipulated time, he has no right to complain ; he could not bring trover against the purchaser for the goods so sold : "—although, if a case precisely the same as *Mucklow v. Mangles* were to occur again, it might require further consideration. But the present case is very different from that : for here both the builder and purchaser treated the chariot as finished ; the whole of the price was paid, and the plaintiff sent for it several times, perhaps suspecting the builder's situation. Is it to be said that, because he ordered a seat to be added, and afterwards determined upon selling the chariot, he is to be divested of his property in it even when the fact of his sending repeatedly shows that he was desirous to have it, whether the seat were added or not ? This disposes of the next objection, that the chariot was in the order and disposition of the bankrupt, with the consent of the true owner, and of the argument that the builder must be esteemed the true owner till actual delivery. The plaintiff was the true owner : for according to the decision in *Hinde v. Whitehouse*, 7 East, 558, the property must have passed to him upon the completion of the sale, and it is absurd to say that the chariot remained in the possession of the builder with the plaintiff's consent, after he had sent for it six or seven times.

The third objection is one of general importance, which the Court will take time to consider. But for that, I should not have reserved the other two points.

PARK, J. I have no doubt on the first and second points, and I do not say that I should agree with the decision in *Mucklow v. Mangles*, if the case were to occur again. But the present is very different, and falls, in effect, within the exception expressly made by *Heath, J.* : " If the thing be in existence at the time of the order, the property of it passes by the contract ; " here, at least, upon the completion of the contract by the payment of the whole price, the thing was to all intents in existence. As to the second point, it would be a violation of common sense to say that the chariot was in the order and disposition of the bankrupt with the owner's consent, after he had sent for it six or seven times.

BURROUGH, J. I have no doubt on any of the points, but as the third is of very general importance, it ought to receive further consideration.

GASELEE, J. I entertain no doubt on the two first objections. The answer to the first is, that the chariot was finished ; and as to the second, if this article be held to have been in the order and disposition of the bankrupt, with the consent of the true owner, every man who sends his carriage to have a nail driven into it, will be liable to lose it under a commission against the builder. The last point is of general importance, and upon that

*Cur. adv. vult.*

BEST, C. J., now stated, that *Park, J.*, and *Burrough, J.*, had no doubt on the third point, and that though *Gaselee, J.*, entertained some doubt, it

was not to such an extent as to induce him to differ from the rest of the Court.

The question is, Whether trover against the assignees of a bankrupt must be brought within three months after the time of the alleged conversion.

When the objection was started at *Nisi Prius*, I thought it alarming to the commercial interests of the country, because it would be most mischievous if persons sending goods from all parts of the world should be deprived of all redress, if, in case of their agent's bankruptcy, they had not the good fortune to be able to commence proceedings within three months; and, upon looking into the act, I am of opinion that the forty-fourth section does not apply to cases of this sort. That section is as follows: "Be it enacted, that every action brought against any person for any thing done in pursuance of this act shall be commenced within three calendar months next after the fact committed; and the defendant or defendants in any such action may plead the general issue, and give this act, and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants, and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs."

It would be extraordinary, indeed, if the legislature should mulct a party with double costs for failing in the establishment of an ordinary claim against assignees, when, if he had failed as against the bankrupt, he would have been liable to no more than the usual charges. Why should such a party be placed in a situation different from other claimants who are liable only to single costs? Undoubtedly the language of the section is very general, but the words "any act done" can scarcely apply to the pecuniary arrangements in which, chiefly, the assignees are concerned: we think they apply rather to acts done for the purpose of taking possession of the property; as by commissioners, or messengers or others, acting under their warrant. It is proper that such persons should have a protection, which it is unnecessary to extend to the assignees. Persons so acting as public functionaries have no funds to answer the expense of proceedings brought against them, and it is therefore they are allowed double costs in case they are found to be in the right; but the assignees have the property of the bankrupt, and in every respect stand in the same situation as he. The Court of King's Bench appear in *Wallace v. Smith*, to have put a similar construction on the words any thing done, by expressing a doubt, whether they applied to such things as could be the ground of an action of *assumpsit*. But in other respects that case was different from the present. By the act on which that decision turned, the West India Dock Company could only be sued in the person of their treasurer; for that purpose he represented the company; if the protection given by the 185th section of the act did not apply to the company, it applied to nobody; and Lord *Ellenborough* concludes his judgment by saying: "The plaintiffs themselves have, by their own action and declaration, so far put a construction upon the thing done as having been done under colour of the act, that they have made the treasurer defendant in a case where the only grievance complained of is imputed to the company." The words of the act too, in that case, went far beyond those of the act under consideration, limiting the commencement of actions to three months, "for anything in pursuance or under colour of that act." In *Sellick v. Drake and Smith*, 2 Carr. & Paine, 284, where one of the defendants was trea-



suror of the same company, I decided the same point, at Nisi Prius, on the authority of *Wallace v. Smith*, and my decision was afterwards confirmed by this Court. (a) In that case there was no person but the treasurer to answer the description of the party protected by the act; here the assignees do nothing, except in the distribution of property, and then they act in right of the property, and not under any power conferred for special purposes by the act.

Rule discharged.

(a) The case is reported 3 Bingh. 603, on a rule which had been obtained on the part of the defendants, Drake and Keeling, to set aside a verdict against them in trover.

The goods, in respect of which the action was brought, having been lodged in the West India docks, Smith, the treasurer of those docks, was joined as a defendant in the action; and a verdict having been found for him under the direction of the Lord Chief Justice, on the ground that the action was commenced more than three months after the thing done, a rule to set it aside was, as against him, refused as it appears above. I was unavoidably absent from London at the time the rule nisi was moved for, and the decision as to Drake and Keeling turns on another point.

### DICAS v. JAY. — p. 281.

1. The objections against an award ought to be specified in a rule nisi obtained for the purpose of setting it aside; but an omission in that respect is not conclusive to preclude the Court from entertaining the objections.
2. Upon a declaration of eleven special counts for negligence, and common counts for money paid, &c., an arbitrator, under an order of Nisi Prius, found that the plaintiff had "good cause of action for 23l. 14s. 10d.," and directed a verdict to be entered up for that sum: Held, sufficiently certain.

**ASSUMPSIT** against the defendant, an attorney, for negligence in the conduct of a suit. There were eleven special counts on the negligence, and common counts for money paid, &c. Money was paid into Court sufficient to cover the demand on the common counts.

The cause having been referred to arbitration, under an order of Nisi Prius, the arbitrator found that the plaintiff had "good cause of action for 23l. 14s. 10d.," and directed a verdict to be entered for the plaintiff for that sum.

By consent, judgment was to be entered up as of last term.

*Cross*, Serjt., moved for a rule nisi to set aside this award; alleging, that as the question of negligence had been submitted to the arbitrator, and he had found that the plaintiff had good cause (not causes) of action, he ought to have shown whether the negligence or the money paid was the cause of action, and to have ordered the verdict to be entered for the plaintiff on the count to which the finding applied; otherwise it did not appear whether he had inquired into all the matters submitted to him; and if the plaintiff had no cause of action in respect of the negligence, the cause of action on the money counts was covered by the money paid into court, and the award was bad for uncertainty.

A rule nisi was granted; but the grounds on which it was sought to set aside the award not being specified in it,

*Wilde*, Serjt., who showed cause, objected, that by the practice of the Court the rule nisi ought to state the objections to the award, which could not otherwise be entered on; but he insisted that the award was sufficiently certain, amounting in effect to a general verdict on all the counts.

*Cross* and *Russell*, Serjts., in support of the rule. There is no written rule of practice requiring in this Court the statement in the rule nisi of the specific grounds on which it is proposed to set aside an award; and if

any such practice exists, (the prothonotary here stated that it did,) it is not conclusive against the Court's having the objections argued: the rule in the King's Bench, although it requires the objections to be specified, does not preclude the Court from hearing them if they be not specified.

**BEST, C. J.** The practice as to stating in the rule nisi the grounds of objection to an award is not so conclusive as to prevent us in this Court from hearing the objections, although not specified. But this award is so clearly made upon the whole matter that I see no reason for setting it aside. In effect, a verdict has been found on all the counts. The judgment, too, being entered up as of last term, can we now set it aside?

**PARK, J.** I come to the same conclusion, with considerable reluctance, under the circumstances of this case. (a) I am also of opinion, after sending to the Court of King's Bench, that the practice which requires the objections to an award to be specified in the rule nisi for setting it aside is not conclusive to prevent the Court from entering into the objections, although not so specified. But passing by any formal errors, I think the finding of the arbitrator is on all the causes of action referred to him, and that, therefore, this rule must be discharged.

**BURROUGH, J.,** said, that it was without doubt the practice of this Court to specify the objections to an award in a rule nisi for setting it aside, but concurred in thinking this award sufficiently certain.

**GASELEE, J.** The practice is not inflexible; but, at all events, here the objection would have been stated without success. The arbitrator finds that the plaintiff had *good cause* (not a good cause) of action for 23*l*. 14*s*. 10*d*. That is the same thing as if he had said, good cause of action to the extent of 23*l*. 14*s*. 10*d*. On the face of the award, therefore, the judgment applies to the whole of the declaration, and this rule must be

Discharged

(a) It appeared from affidavits to other points to be a case of much hardship on the defendant.

### BEDINGTON v. BEDINGTON. — p. 284.

The Court discourages the practice of ordering nihil to be returned to a scire facias.

**THE** plaintiff left a writ of scire facias with the sheriff, to be returned nihil.

The sheriff having omitted to return the writ, because the plaintiff refused to pay a sum of 6*s*. 8*d*. more than what he considered the regular fee,

**Wilde, Serjt.,** obtained a rule calling on the sheriff to show cause why he should not return the writ, and pay the costs of the motion.

The sheriff thereupon returned the writ, but

**Russell, Serjt.,** showed cause against that part of the rule which called for the costs of the motion; and read affidavits, in which the sheriff attempted to show he had demanded no more than was usual.

**BEST, C. J.,** thought that the demand had been improperly made; but advertng to the circumstance that the plaintiff had ordered the writ to be returned nihil, and animadverting on the mischief and injustice of proceeding on writs, of which the defendant never received any notice, considered that both parties were to blame. With a view, therefore, to discourage the practice of ordering returns of nihil, the Court discharged the rule without costs.

Rule discharged accordingly.

## WEBB, Demandant; LANE, Tenant.—p. 285.

Judgment signed in a writ of right, because a blank was left for the word *esplees* in the count, set aside.

In this writ of right a blank having been left in the count for the word *esplees*, and no London attorney's name being indorsed on it, but only the name of a Plymouth attorney, judgment was signed by the tenant, which *Wilde*, Serjt., obtained a rule nisi to set aside as irregular.

*Taddy*, Serjt., who showed cause, contended that the count was ill, on account of the above omissions; and that it was not the practice to permit amendment in a writ of right. *Charlwood v. Morgan*, 1 N. R. 66.

*Per Curiam*. This was not an irregularity for which the tenant could take judgment, and the demandant may amend, on payment of costs.

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 Lord FALMOUTH v. GEORGE.—p. 286.

1. Keeping up a capstern and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, Held, a good consideration for a reasonable toll on all boats frequenting the Cove, whether they used the capstern or not; and the custom to exact the toll held good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shown to have been such; but he and they had always been owners of the spot on which the capstern stood, and of an estate in the neighbourhood.
2. Held, that a fisherman frequenting the cove was not a competent witness for a party resisting the toll.

In this action the plaintiff sought under a custom to establish a claim to the second best fish out of every boat load of fish landed in Senan Cove in Cornwall.

At the trial before *Burrough*, J., last Cornwall Spring assizes, a custom was proved under which the plaintiff and his ancestors had maintained a capstern and rope, which was sometimes used by the fishermen to draw up their boats to a place out of the reach of the tide, in Senan Cove. The plaintiff insisted, and the jury found, that whether the capstern and rope were used or not the plaintiff was entitled to the second best fish out of every boat load landed in the Cove. In certain states of the tide, and in tempestuous weather, boats could not be drawn up from the sea with safety to the crews without the assistance of the capstern and rope.

Senan Cove, except the small part on which the capstern stood, was the soil of a Mr. Williams. But it appeared that the part on which the capstern stood had been in the possession of the plaintiff and his ancestors (who were the owners of a farm in the neighbourhood called Penrose Farm) for as long a period as the oldest witnesses could recollect, and that this part was separated from the rest of the Cove by a wall that surrounded the capstern. The space between this wall and the sea, over which the boats were drawn by the capstern, was left entirely open, and was the property of the person to whom the rest of the Cove belonged. It also appeared that Senan Cove was rendered a proper place for the landing of boats by human labour: that rocks had been removed, and a track made for the hauling up boats to a place above the reach of the tide.

At the trial it was proposed to examine as a witness for the defendant, to disprove the custom, a person who admitted that he was then a fisherman frequenting Senan Cove. The learned Judge rejected this person's testimony.

A verdict having been found for the plaintiff,

*Bosanquet*, Serjt., in Easter term obtained a rule nisi to set it aside, on the ground that no consideration had been shown in support of the custom, at least as against boats that did not use the capstern, and that the testimony of the fisherman ought not to have been rejected.

*Wilde*, Serjt., showed cause. The circumstances of Senan Cove having been made by art, and of the owners of Penrose estate having always possessed the soil on which the capstern stood, and having always repaired it, are sufficient to raise a presumption that the soil of the whole Cove formerly belonged to them. If so, the toll exacted would be a toll traverse, for which no consideration need be shown, *Fitz. N. B. 227*, *Com. Dig. Toll (D)*. In *Lord Pelham v. Pickersgill*, 1 T. R. 667, *Ashhurst, J.*, says, "Toll thorough cannot be supported without showing a consideration; but toll traverse may; and the reason is, that the very circumstance of passing over the soil of a private person, where the public had no right before to pass, imports a consideration."

Although in order to constitute a toll traverse the soil and the toll both ought originally to have been in the same hands, yet tolls have been supported in many cases where they have been severed from the ownership of the land, and their original union could only be matter of presumption. Thus, in *Rickards v. Benett*, 1 B. & C. 223, where, in an action of trespass, the lord of a manor set out various burdens borne by him, and then prescribed, not by reason of those burdens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor, it was held, after verdict, that this was good as claim of toll traverse, although the burdens set out did not constitute a sufficient consideration for a toll thorough. It was also held, that where a legal commencement of a prescription can be presumed, that, after verdict, is sufficient to support the claim. *Crispe v. Belwood*, 3 Lev. 424, is to the same effect.

But if it be necessary to show a consideration, sufficient consideration has been shown here. Senan Cove has been made a landing place by art, and *The Mayor of Yarmouth v. Eaton*, 3 Burr. 1402; has decided that the making a port is a good consideration for the exaction of a toll. Even the repairing of the capstern, which is necessary to the safety of boats frequenting the Cove, is a sufficient consideration: *Colton v. Smith*, Cowp. 47. In that case a prescription as lord of the manor for toll of goods landed within the manor, in consideration of repairing a wharf within the manor, was holden good.

Then, as to the rejection of evidence, the fisherman was properly excluded because he frequented Senan Cove; and a verdict in favour of the plaintiff would have been evidence against the witness in another action of the same custom: *City of London v. Clerke*, Carth. 181, *Carpenters' Company v. Hayward*, Dougl. 374, *Hockly v. Lambe*, 1 Ld. Raym. 731, *Earl of Clanrickard v. Denton*, *Eagle and Young's Tithe Cases*, 306.

*Bosanquet*. Although a toll traverse may be taken after it has been severed from the ownership of the land in respect of which it originally accrued, yet in order to sustain it, it must be proved, and not merely presumed, that it was originally united with the land. A toll can only be proved to be a toll traverse by showing that it either is or has been united to the ownership of the soil; but to presume that it has been so united, merely because it is paid, is to beg the question in dispute, and in effect to abolish the distinction between toll traverse and toll thorough.

In *Crispe v. Belwood*, *Colton v. Smith*, *Lord Pelham v. Pickersgill*, and *Rickards v. Benett*, the original union of the ownership of the land and tolls

was proved by the circumstance that the party claiming the tolls was lord of the manor, in whose predecessors the lands of the manor were originally vested. "And it may be intended that all the lands within the manor are demesnes of the manor, for so they were at first, till the lord divided them among his tenants," 3 Lev. 424.

But the present is a toll thorough, for which a consideration must be shown: 22 Ass. 58, *Smith v. Shepherd*, Moore, 574; and "courts are exceeding careful and jealous of these claims of right to levy money upon the subject: these tolls began and were established by the power of great men:" *Truman v. Walgham*, 2 Wils. 299.

Then, the consideration shown is insufficient even if the defendant had used the capstern; for in *Warren v. Prideaux*, 1 Mod. 104, a prescription to have a bushel of salt of every ship that came laden with salt within a certain port, in consideration of maintaining the quay and keeping a bushel to measure the salt, was holden ill; and *Hale*, C. J., said, "If any man will prescribe for a toll upon the sea, he must allege a good consideration, because by Magna Charta and other statutes every one hath a liberty to go and come upon the sea without impediment." But with respect to persons who are not shown to have used the capstern, the keeping it up is clearly no consideration. In *Haspurt v. Wells*, 1 Mod. 47, a claim of toll for all ships passing by the plaintiff's wharf and crane was held unsustainable for want of consideration. In *The Mayor of Yarmouth v. Eaton*, the claim of toll was in respect of corn exported from the port of Yarmouth, and the defendant would have been unable to ship his cargo but for the convenience of the port. But no case can be cited of a toll thorough being sustained where it has not been exacted in respect of some benefit to the party charged; or a toll traverse, where the soil in respect of which the toll is claimed has not been shown at some time to have belonged to the owner of the toll.

Then, the testimony of the fisherman ought not to have been excluded. The plaintiff's claim is in respect of a private right accruing to him by prescription, and not under a custom affecting the public. If this witness were properly excluded, no man could ever establish a prescriptive right of road by any witnesses who had occasion to use the track in question; and few or none other would know anything about it. So here the fisherman ought to have been admitted, if for no other reason, from the necessity of the case. It was impossible for any one to speak to the usage in respect of the capstern but such as frequented the cove, and against all such the plaintiff made his claim.

BEST, C. J. The plaintiff claimed the second best fish out of every boat load of fish that was landed in Senan Cove.

This claim was founded on a custom under which the plaintiff and his ancestors had maintained a capstern and rope, which were sometimes used by the fishermen to draw up their boats to a place out of the reach of the tide. The plaintiff insisted, and the jury found, that whether the capstern and rope were used or not, the plaintiff was entitled to this toll. In certain states of the tide, and in tempestuous weather, boats could not be drawn up from the sea with safety to the crews without the assistance of the capstern and rope.

Senan Cove, except the small part on which the capstern stood, was the soil of a Mr. Williams. But it appeared that the part on which the capstern stood had been in the possession of the plaintiff and his ancestors (who were the owners of a farm in the neighbourhood called Penrose Farm), for as long a period as the oldest witnesses could recollect, and that this part was separated from the rest of the Cove by a wall that surrounded the capstern. The space between this wall and the sea, over which the boats were

drawn by the capstern, was left entirely open, and was the property of the person to whom the rest of the Cove belonged. It also appeared that Senan Cove was rendered a proper place for the landing of boats, by human labour: that rocks had been removed, and a track made for the hauling up boats to a place above the reach of the tide. It has been objected, that there was no consideration for the custom for taking toll from the owners of boats who did not make use of the capstern to draw up their boats from the sea.

Although it is not always necessary to use the capstern, yet if boats in certain seasons could not safely approach this place unless they were certain of having the assistance of the rope of the capstern to draw them out of the surf of the sea, we think that the keeping of the capstern and rope ready for the use of fishermen who resort to this Cove is a sufficient consideration for a toll to be paid by them, whether they actually use it or not. No boats could put to sea with any thing like safety if proper means were not provided to draw them out of the breakers, in case a strong wind should set in towards the land.

Although the fishermen may not always use the capstern, it is of advantage to them. Nay, it is essential to their safety that it should be kept ready for them. The keeping of a capstern for such a purpose is a sufficient consideration for a reasonable toll.

There is no doubt that the king may at this time establish a reasonable toll for the performance of any duty that the public convenience or safety requires should be performed.

The creation of a toll is only a mode of paying for a public service. The power of creating tolls depends upon the necessity of the service and the reasonableness of the toll taken for it. If the service be not of public advantage, or the toll be unreasonable, it cannot be supported. But it is impossible to contend that this capstern and rope is not of the greatest importance to these fishermen. And it was not suggested, either at the trial or in the argument here, that the toll demanded was excessive or unreasonable. If the plaintiff had purchased this land a year ago, had made a landing place in this Cove, had built a capstern, provided a proper rope, and undertaken to keep the capstern and rope in a proper state at all times for the use of the fishermen, it would have been a sufficient consideration for the grant of such a toll by the crown, as the jury have found was due to the plaintiff by virtue of a custom.

Now it is well known that many tolls are good under a custom of which a good grant could not be made at the present time. A custom which is proved to have existed immemorially will be good, if it be of such a nature that it is possible it can have had a good beginning. Although it be such as to confer what the king cannot now grant, yet, if it be not contrary to reason, it may be supported; for it might have had its commencement from an act of the legislature. Custom is a local law which supersedes the general law; and if the law give us the maxim *consuetudo ex certâ causâ rationabili privat communem legem*, the custom on which the plaintiff rests his claim appears to us to be reasonable and convenient even to those who resist its establishment; advantageous to the public, by encouraging a valuable fishery; and highly beneficial, as tending to the preservation of human life.

We have, therefore, no doubt that this is a valid custom. In the case of *The Earl of Falmouth v. Penrose*, 6 B. & C. 385, the validity of the custom was never disputed; the objection there taken was, that the pleadings were not applicable to the case proved.

At the trial it was proposed to examine a man as witness for the defendant to disprove the custom, who admitted that he was then a fisherman frequent-

ing Senan Cove. My learned brother rejected this person's evidence, and we are of opinion that he was not a competent witness. Although the declaration did not set out the custom, yet, as the plaintiff claimed his right upon a custom, and the defence consisted in a denial of it, the judgment in this case, with evidence showing that the question at the trial was whether there was a custom or not, would be admissible, should an action be brought against the witness for landing fish in Senan Cove, without paying the toll.

Wherever customs are set up, judgments in causes between other parties are admissible in evidence to prove or disprove such customs. The witness had, therefore, a direct and immediate interest to obtain a verdict for the defendant, as he might use such a verdict to protect himself, in case an action should be brought against him for non-payment of tolls due on the landing of fish by himself. This point is expressly decided by the case of *The Company of Carpenters v. Hayward*, where witnesses were rejected who were called to prove they had worked as carpenters in Shrewsbury, though not free of the company. Lord *Mansfield* said, "If the company had failed in establishing the custom, the witnesses would have been discharged from actions to which they were liable for the breach of it." We do not mean to say that an intention to bring fish into Senan Cove immediately after the cause was tried, or the having brought fish there without paying the tolls so long ago as that those who brought them were protected by the statute of limitations, would render witnesses incompetent. The former have no interest, and the interest of the latter, like that of an heir at law, is future and contingent. If such persons were not competent witnesses, few, who had any knowledge on the subject, could be received, who could disprove a toll thorough or a toll traverse. We put the incompetency of the witness upon the ground of his immediate liability to an action in the event of the verdict being for the plaintiff, and his being relieved from that liability by a verdict for the defendant. We are of opinion that the rule for a new trial must be discharged.

Rule discharged accordingly.

## ELWORTHY and Others v. THOMAS MAUNDER. — p. 295.

Affidavit, that the defendant had undertaken to be answerable to the creditors of J. and W. M. for the amount of the debts of such creditors, on their, the creditors, undertaking not to issue a commission of bankrupt against J. and W. M. before the 16th of August; that J. and W. M. owed plaintiffs 1000*l.*; that neither plaintiffs, nor, as they were informed and believed, any other of the creditors of J. and W. M., sued out a commission of bankrupt against J. and W. M. before the 16th of August; that neither J. and W. M. nor defendant paid plaintiffs the 1000*l.* due to them from J. and W. M.; and that defendant owed plaintiffs 1000*l.* upon his said undertaking: Held, insufficient to hold defendant to bail.

THE defendant was arrested and holden to bail on the following affidavit: — “ William Elworthy of Wellington, in the county of Somerset, woollen manufacturer, maketh oath and saith, that by a memorandum in writing, bearing date the 11th day of August, 1828, and signed by Thomas Maunder of Crediton, in the county of Devon, farmer, the said Thomas Maunder did undertake and agree to be answerable to the creditors of certain persons using the style and firm of William Maunder and James Maunder, for the amount of the debts of such creditors on their (the said creditors) undertaking not to issue a commission of bankrupt, or sue out process against them, the said W. Maunder and J. Maunder, on or before Saturday, the 16th day of August, then instant; and this deponent further saith, that he and one Thomas Elworthy the elder, and one Thomas Elworthy the younger, trading together as copartners, and using the style and firm of Messrs. Thomas Elworthy and Co., were and now are creditors of the said W. Maunder and J. Maunder; and that they, the said W. Maunder and J. Maunder, were on the 11th day of August, instant, and still are, indebted to this deponent and the said Thomas Elworthy the elder, and Thomas Elworthy the younger, in a certain large sum of money, to wit, the sum of 1000*l.* and upwards, that is to say, the sum of 300*l.*, on a bill of exchange, drawn by the said W. Maunder and J. Maunder upon one Joseph Lambert, and payable to the order of the said Messrs. Thomas Elworthy and Co., at a certain day now past, and in the further sum of 700*l.* and upwards, for goods sold and delivered by this deponent and the said Thomas Elworthy the elder, and Thomas Elworthy the younger, to the said William Maunder and James Maunder, and at their request; and this deponent further saith, that he, confiding in the said undertaking and agreement of the said Thomas Maunder, did not, nor hath the said Thomas Elworthy the elder, and the said Thomas Elworthy the younger, or either of them, nor have nor hath (as this deponent is informed and believes) any or either of the other creditors of the said W. Maunder and J. Maunder caused a commission of bankrupt to be issued, or sued out any writ or other process against them, the said W. Maunder and J. Maunder, or either of them, on or before the said 16th day of August; yet that the said Thomas Maunder (although often requested so to do) hath not, nor have the said W. Maunder and J. Maunder, or either of them, as yet paid the said sum of 1000*l.*, or upwards, or any part thereof, to this deponent, or to the said Thomas Elworthy the elder, or Thomas Elworthy the younger, or either of them, but that the same still remains wholly due and unpaid; and this deponent further saith, that the said Thomas Maunder is justly and truly indebted to this deponent, and the said Thomas Elwor



thy the elder and Thomas Elworthy the younger, in the said sum of 1000*l.* and upwards, upon and by virtue of the said memorandum, and the undertaking and agreement of the said Thomas Maunder therein mentioned; and this deponent lastly saith, that no offer hath been made to this deponent, or to the said Thomas Elworthy the elder, and Thomas Elworthy the younger, or either of them, by the said Thomas Maunder, or by the said William Maunder, or either of them, to pay the said sum of 1000*l.* and upwards, or any part thereof, in any note or notes of the Governor and Company of the Bank of England expressed to be payable on demand."

A rule nisi was obtained for delivering up the bail-bond to be cancelled, on the ground that the defendant's liability to the plaintiffs, if he was liable at all, depended on the performance of a condition precedent, namely, an undertaking by all the creditors of James and William Maunder not to sue out a commission of bankrupt against them before the 16th of August, and the affidavit contained no averment that any such undertaking had been given, nor even (except upon information of others) that all the creditors had actually abstained from suing out a commission during that period. It was also objected that it did not appear that the plaintiffs were so much as parties to the agreement.

*Jones and Stephen*, Serjts., who showed cause, endeavored to answer these objections; but

*Wilde*, Serjt., in support of the rule, having referred to *Phillips v. Bateman*, 16 East, 356, where a general undertaking, "to be accountable for the payment of the notes issued by the Milford bank, as far as the sum of 30,000*l.* will extend to pay," was holden not to confer a right of action to an individual holder of such notes; and to *M'Pherson v. Lovie*, 1 B. & C. 108, where the Court set aside a bail-bond taken on an affidavit "that the defendant had promised to pay the plaintiff 1000*l.* if he did not marry her in March or April next; that she was ready to be married to him, but that he neither married her in March or April nor paid the 1000*l.*," because, no similar promise by the plaintiff being averred, it did not appear that there was any consideration for the defendant's promise,

*The Court* held, that in any view of the case an undertaking by all the creditors of James and William Maunder not to sue out a commission against them was a condition precedent to any liability to be incurred by the defendant; and that the performance of such condition not having been alleged in the affidavit, (a) the rule must be made Absolute.

(a) No such undertaking was ever given by all the creditors, as appeared by other affidavits filed in support of the rule.

## MEMORANDA.

In the course of this term *James Parke*, Esquire, was called to the degree of the coif, and gave rings with the following motto:—"Tenax justitiæ," and on the same day took his seat as one of the puisne Judges, in the Court of King's Bench.

*Thomas Denman*, Esquire, received a patent of precedence.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

HILARY TERM,

In the Ninth and Tenth Years of the Reign of GEORGE IV.—1829.

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ABBEY v. LILL. — p. 299.

1. *Seemle*, that a postmark may be proved by any one in the habit of receiving letters by the post.
2. An action to recover the balance of an account is not within the Boston Court of Conscience Act, if the account originally exceeded 5*l*., although the sum sought to be recovered is less than 5*l*.

ACTION to recover 3*l*. 6*s*., remaining due upon a bill of exchange for 8*l*. 6*s*., with interest, which bill had been given to secure the balance of an account between the plaintiff and defendant, originally amounting to 400*l*. The declaration contained also a count upon an account stated. The business to which the account related had been transacted in London.

At the trial, before *Best*, C. J., London sittings after Hilary term, the only evidence in support of the plaintiff's demand was a letter from the defendant, which, provided it were written in 1825, contained a sufficient acknowledgment to entitle the plaintiff to a verdict. The letter, however, was dated by the writer January, 1824.

To show that it was written in 1825, and that the figure 4 had been put for 5, by a mistake common at the commencement of every new year, the plaintiff relied on the postmark. To this it was objected, on the part of the defendant, that the mark itself was not clear; and that, at all events, the genuineness of a postmark could only be established by calling a person from the post-office.

The learned Chief Justice said, that if there were any doubt about the genuineness of the mark, he would send for a clerk from the post-office.

The jury, however, entertained no doubt about the genuineness of the mark, or the date intended, and gave their verdict for the plaintiff.

*Wilde*, Serjt., obtained a rule nisi to set aside this verdict, upon the

ground that the postmark had been improperly taken as evidence; or to enter a suggestion under the Boston Court of Conscience Act, 47 G. 3, sess. 2, c. 1, s. 18, (a) to deprive the plaintiff of his costs, upon an affidavit that the defendant lived within the jurisdiction of that court.

*Jones*, Serjt., showed cause. The postmark was properly admitted in evidence. It is true that in *Rex v. Watson*, 1 Campb. 214, Lord *Ellenborough* refused to allow a Middlesex postmark, unauthenticated, to be proof of publication in Middlesex of a libel contained in the letter; that, however, was a criminal case. But in *Arcangelo v. Thompson*, 2 Campb. 620, where a policy, dated 1797, had been effected in the name of S. Levy, who was averred in the declaration to have been "the person residing in Great Britain who received the order for and effected the policy," the plaintiff's counsel, to prove the order, gave in evidence a letter from him, dated Trieste, addressed to Levy in London, and having upon it the English ship-letter postmark, with the date of 1797: and Lord *Ellenborough* held, after argument, that this was sufficient evidence of the receipt of the order by Levy before the effecting of the policy:

And though in *Fletcher v. Braddyl*, Stark. Ev. Appx. 4 to 853, a post-mistress was called to prove a postmark, yet she was not the person who made it, and, therefore, could have no other knowledge of the genuineness of the mark, than its general appearance; a knowledge which is possessed in an equal degree by every one in the habit of receiving letters by the post.

But here the question of law is superseded by the offer of the Chief Justice to send to the post-office, if such a mode of proof were required.

With respect to the suggestion, the fifteenth section of the Boston act expressly excludes actions brought to recover the balance of an account originally exceeding five pounds. It provides, "That nothing in this act contained shall extend, or be construed to extend, so as to enable the said commissioners to decide on any debt for any sum being the balance of an account or demand originally exceeding five pounds."

*Wilde*. The postmark ought to have been proved by some one who could speak positively to its genuineness; it was not enough that the jury assumed it to be genuine; they had no grounds for doing so, and the Court cannot take judicial notice of such a mark. The rules of evidence are the same in civil as in criminal cases, and *Rex v. Watson* is in point. In *Arcangelo v. Thompson*, the proof required was complete by the contents

(a) By the Boston Court of Conscience Act, 47 G. 3, c. 1, s. 18, it is enacted, "That it shall and may be lawful to and for any person or persons (whether such person or persons shall reside within the jurisdiction of the said Court or not) having any debt or debts, on the balance of account or otherwise howsoever, not exceeding the value of five pounds, due or owing or belonging to him, her, or them, by or from any other person or persons whatsoever, inhabiting, residing, or being within the said borough or parish of Boston, or keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall, stand, or using or frequenting the markets there, or seeking a livelihood, or in any way trading or dealing within the same, to apply to the clerk of the court for the time being, or his deputy, who shall immediately make out and deliver to one of the sergeants of the said court for the time being a summons in writing," &c. And,

By section 41, it is also enacted, "That if any action or suit for any debt recoverable by virtue of this act in the said court of requests shall be commenced in any other court whatsoever, or elsewhere than in the said court of requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not by reason of a verdict for him, her, or them, or otherwise have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the judge or judges before whom the same shall be tried or heard shall think fit to certify that such debt ought to have been recovered in the said court of requests, then and in every such case such defendant or defendants shall have costs," &c.

of the letter, without the postmark, and, therefore, the genuineness of the mark was not questioned. But in *Fletcher v. Braddyl* a postmistress was called, as being skilled in the knowledge of such marks. [*Gaselee, J.* Is not that decisive? every one is cognizant of the mark.]

Then, as to the Boston act; the fifteenth section is far from being precise, while the fourteenth section seems expressly to include such a case as the present. That section enacts, "That it shall and may be lawful to and for the said commissioners, and they are hereby enabled to decide and determine all disputes and differences between party and party, for any sum not exceeding five pounds, in all actions or causes of debt, whether such debt shall arise on any promissory note or inland bill of exchange, or for rent upon leases, articles, minutes, and in all cases of assumpsit and insimul computasset," &c., and by section 17, it is "Provided that in case any plaintiff who shall have split or divided such his or her cause of action, shall be willing to accept such sum of money as the said court is in and by this act enabled to adjudge, decree, and pronounce, in full of the whole of his or her demand in such cause or action so split or divided, then and in every such case the said commissioners shall and may adjudge, decree, and pronounce (on such plaintiff proving his or her cause or case to the satisfaction of the said commissioners) such sum to the plaintiff, not exceeding the sum of five pounds, as to the said commissioners shall seem just and reasonable; and such sum shall, in the judgment or decree to be pronounced by the said commissioners, be declared to be, and shall be, in full discharge of all demands from the defendant to the plaintiff in such cause or case so split or divided."

BEST, C. J. The jury were satisfied that the mark on this letter was the post-office mark; but the question is, Whether it was necessary that that fact should have been proved; and by whom. Certainly not by the postmaster of another office; for he would know no more of the mark than any other individual; so that in *Fletcher v. Braddyl* the proof was carried no farther than in the present case. If there be any doubt as to the genuineness of the mark, the person who made it is the best witness to be called; the knowledge of all other persons on the subject is equal; but I should be slow to say, that a witness should be called to a distance, from London, or Cumberland, perhaps, to prove the postmark of every letter, the date of which may be disputed.

However, in the present case, I do not decide the point: I decide on the ground that I offered to send to the post-office for the person who made the mark; but such strictness of proof was then no longer insisted on. Then, is this a case within the Boston act? If that act had been confined to cases where the plaintiff and defendant both lived in Boston, I should have been disposed to give it the fullest effect; but I am unwilling to make Boston a place of refuge for debtors, where the debt has been incurred in London. Such an act ought to receive a strict construction; but this case is taken out of it by the provision in the fifteenth section, the action having been brought to recover the balance of an account originally exceeding five pounds.

GASELEE, J. (b) Under the circumstances of this case I think the rule

(b) *Park, J.*, was absent on account of illness; and *Burrough, J.*, was at chambers but concurred in the judgment of the Court.

ought to be discharged. I do not lay it down that a postmark is to be taken to be genuine without regular proof.

In general, the mark is not disputed; but where it is disputed, it ought, perhaps, to be proved, though what might be deemed to amount to proof is not clear; a postmistress of another office having been allowed to give evidence on the point, while persons, who live in London, and see the mark every day, are on that account, perhaps, as competent to speak concerning it as such a postmistress. But here, as the Chief Justice offered to send to the post-office, and was not required to do so, the objection seems to have been waived.

As to the suggestion, the bill of exchange, on which the action was brought, was given to secure the balance of an account originally exceeding five pounds; the case, therefore, falls clearly within the provision of the fifteenth section, and the rule must be

Discharged.

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FERGUSON v. CHRISTALL and Another. — p. 305.

F., who had hired a ship and its tackle of the plaintiff for three voyages, at the end of the first, being apprehensive of a seizure under the process of an admiralty court, placed the cables and anchors on the defendant's wharf, alongside of which the ship lay. The ship was then seized for seamen's wages and a debt on bottomry, and shortly afterwards was sold under admiralty process, without the anchors and cables. Two days before the sale, the plaintiff demanded of the defendant the anchors and cables on his wharf, which the defendant, holding them from F., refused to give up. Held, that on this demand, previous to the sale, the plaintiff could not sue the defendant for the anchors and cables in trover, although they had not been removed out of the ship in the ordinary course of business: Held, also, that the removal of them from the ship to the wharf, whereby they escaped the admiralty sale, was no injury to the plaintiff's reversionary interest.

THE plaintiff, a ship-owner, who had let out his ship on a charter-party, declared upon an alleged injury to his reversionary interest in the ship and its tackle. He also added a count in trover for anchors and cables.

At the trial, before *Best*, C. J., London sittings after Trinity term, it appeared that *Frazer, Living, and Co.*, had chartered the plaintiff's ship for three voyages; that upon her return home at the end of the first voyage, the charterers with considerable speed removed the anchors and cables from the ship to the defendant's wharf alongside; that very soon after this had been done, on the 8th of December, 1827, the ship was arrested under an admiralty warrant, by the holder of a bottomry bond, given by the charterer's captain for the equipment and outfit of the ship, and also for provisions. which latter, with the pay of the crew, the charterers were bound under the charter-party to provide.

Subsequently to December other warrants were lodged against the ship, for the pay of the crew, &c., to the amount of 2100*l.* more. A decree of sale was given the 21st of March, and the ship was sold on the 1st of April, 1828.

On the 28th of March, 1828, the plaintiff demanded the anchors and cables of the defendants, who refused to give them up, alleging that they did not know the plaintiff in the business.

It was contended that the anchors and cables had been improperly removed from the ship to avoid the admiralty process; that if they had remained on board, and had been seized and sold with the ship, a surplus would have remained upon the sale, after satisfying the admiralty demands, and that the plaintiff's reversionary interest expectant on the determination of the term granted by the charter-party was injured to the extent of that surplus; or that at all events, by the improper removal of the anchors and cables from the ship, the right to the possession of them re-vested in the plaintiff sufficiently to support his count in trover.

To this it was answered, that the charterers had in the ordinary course of business a right to remove the anchors and cables from the ship to the wharf; that it was not easy to see how the plaintiff's reversionary interest was injured by the anchors and cables *not* having been seized and sold; and that according to the terms of the charter-party he could have no right to the possession of them till the expiration of the three voyages, so that there was no evidence to support the count in trover. *Gordon v. Harper*, 7 T. R. 9.

The learned Chief Justice left it to the jury to consider, first, Whether the anchors and cables had been taken out of the vessel for a legitimate purpose, or to avoid the process of the court of admiralty; and,

Secondly, if so, Whether the plaintiff had sustained any injury.

The jury found that the anchors and cables had not been removed in the ordinary course of business, and that the plaintiff had been injured to the extent of 244*l.* 15*s.*, the value of the anchors and cables, for which sum they give their verdict.

*Wilde*, Serjt., on the arguments urged for the defendants at the trial, obtained a rule nisi to set aside this verdict, and enter a nonsuit instead; he referred to *Jackson v. Pesked*, 1 M. & S. 234, to show that to entitle a party to recover for an injury to the reversion, the injury must be of a permanent nature.

*Mereweather*, Serjt., now showed cause. He put the injury to the reversion, on the same ground as at the trial; and to show that the plaintiff could support the count in trover, he cited *Loeschman v. Machin*, 2 Stark, N. P. C. 311, where the hirer of a piano, who sent it to an auctioneer to be sold, was holden to be guilty of a conversion; as also an auctioneer, who refused to give it up unless expenses incurred were first paid.

BEST, C. J. I was clearly of opinion at the trial, that the count in trover could not be supported, and am still of the same opinion. Trover will not lie for the plaintiff, because, according to the principle laid down in *Gordon v. Harper*, he had no right to the possession of the goods till the period for which he had let them, under the charter-party, expired. It has been contended, indeed, that his right to the possession of them reverted upon their being removed from the ship with which they were let; and I agree that this might have been so, if the removal, as in the case of *Loeschman v. Machin*, had been a wrongful removal; but, here, though not removed in the ordinary course of business, they were placed on the defendant's wharf ready for the use of the ship. So likewise, had they been demanded subsequently to the sale of the ship, the plaintiff might, perhaps, have sued in trover; but they were demanded two days before the sale, and at that time it was not certain that Fraser and Living might not require them again for the use of the ship. Till the sale of the

ship at least, the defendants, who had received the goods from those who had a right to the possession, could not be esteemed wrong-doers in retaining them for the only persons they knew in the business.

With respect to the alleged injury to the reversion, if the jury had found that the goods had been injured, there might have been some ground for the action; but the mere removal of them was not such an injury as to entitle the plaintiff to sue in that respect. The rule for a nonsuit must be made absolute.

BURROUGH, J. (a) There is no evidence of any conversion by the defendants after the sale of the ship, before which the plaintiff was not entitled to the possession, so that the count in trover falls to the ground. Nor was there any such injury to the plaintiff's reversion as to give him a right to sue for damages.

GASELEE, J. It is clear no action lies for the supposed injury to the plaintiff's reversion; and, with respect to the count in trover, this case differs essentially from that of *Loeschman v. Machin*, because there the defendant, an auctioneer, received the goods for an improper purpose, and made himself a party by insisting on retaining them until his expenses were paid. Here, when the goods were delivered to the defendants, Fraser and Living had the entire control over them; so that, unless it could be shown that they had improper intentions as against the plaintiff, their right to place them with the defendants could not be disputed. If Fraser and Living had paid the demand in the admiralty court, as they might have done, the goods were theirs for the time mentioned in the charter-party. At all events the plaintiff had no title to the possession of them till the ship was sold.

Rule absolute.

(a) *Park, J.*, was absent, being unwell.

## (IN THE EXCHEQUER CHAMBER.)

WILLIAMS v. PROTHEROE. — p. 309.

An agreement between the seller and purchaser of an estate, that the purchaser bearing the expense of certain suits commenced by the seller against an occupier for arrears of rent, should have the rent to be so recovered, and any sum that could be recovered for dilapidations, and that the purchaser, bearing the expenses, might use the seller's name in actions he might think fit to commence against the occupier for arrears of rent or dilapidations, is not void, as savoring of champerty.

ERROR from the Court of King's Bench. The declaration stated that, whereas, on the 14th day of December, in the year 1823, at Chepstow, in the county of Monmouth, by a certain agreement then and there made between the said Edmund Williams, the defendant, of the one part, and the said Thomas Protheroe, the plaintiff, of the other part, the date whereof was the day and year aforesaid, the said Edmund for himself, his heirs, executors, and administrators, in consideration of the sum of 1300*l.* to be paid to him or them, on the 2d day of February then next ensuing the date thereof, by the said Thomas, did thereby agree with the said Thomas, his heirs and assigns, to sell and convey to him, the said Thomas, his heirs and assigns forever, on the said 2d day of February then next, a certain freehold messuage or dwelling-house, and certain customary

messuages, lands, &c., in the said agreement particularly mentioned and described, and the said Thomas, for himself, his heirs, executors, and administrators, did thereby agree with the said Edmund, his heirs, executors, and administrators, to purchase the said freehold and customary messuages, lands, and hereditaments, thereinbefore mentioned and described, and to pay the said Edmund, his executors and administrators, for the same, the sum of 1300*l.* on the said 2d day of February, then next, on having the same conveyed and surrendered to him, the said Thomas, his heirs and assigns, by the said Edmund or his heirs, — and it was further agreed that the said Thomas should bear all the expense, costs, and charges of the conveyance and surrender to him of the said freehold and customary hereditaments and premises, and of any fines, recoveries, or other assurances necessary to convey and surrender the same respectively, and it was further agreed by and between the said parties thereto, that the said Edmund, his heirs, executors, and administrators, should receive the rents and pay all outgoing, in respect of the said freehold hereditaments, up to the said 2d day of February then next; and, after reciting that proceedings, both at law and in equity, were then pending between the said Edmund and Sir Henry Protheroe, in which proceedings at law the said Edmund was plaintiff, and sought to recover from the said Sir H. Protheroe six years' rent, at 80*l.* per annum, due the 2d day of February then last, for and in respect of the said customary hereditaments and premises, under and by virtue of a certain agreement made between the said Edmund and the said Sir H. Protheroe, it was by the said agreement further agreed and declared by and between the said parties thereto, that the said Thomas, his heirs, executors, and administrators, should have and receive the said arrears of rent so claimed to be due from the said Sir H. Protheroe, for his and their own use and benefit, and also the said rent due from the said Sir H. Protheroe, or to become due for the current year, ending on the 2d day of February then next; and, also, that the said Thomas, his heirs, executors, and administrators, should have and be entitled to all sums of money that could be recovered from the said Sir H. Protheroe, for and in respect of dilapidations and wants of repair of and in the said customary hereditaments and premises; and it was thereby further agreed, that the said Thomas, his heirs, executors, and administrators, should be at full liberty to use the name or names of the said Edmund, his heirs, executors, and administrators, in the proceedings at law and in equity then pending between the said Edmund and the said Sir H. Protheroe; and, also, in any other action or actions, suit or suits, which he, the said Thomas, his heirs, executors, and administrators, should think proper to commence and prosecute against the said Sir H. Protheroe for the recovery of the said arrears of rent, or of the current year's rent, or for dilapidations, or wants of repair of and in the said customary hereditaments and premises; and it was thereby further agreed, that the said Thomas should bear, pay, and discharge the costs of the said Edmund in the proceedings then pending, and indemnify him, the said Edmund, his heirs, executors, and administrators, of, from, and against all costs and charges of any future proceedings that might be had by the said Thomas, in the name of the said Edmund, his heirs, executors, and administrators, against the said Sir H. Protheroe; as by the said agreement, reference being thereunto had, fully appears; and the said agreement being made as aforesaid, afterwards, to wit, on, &c., at, &c., it was at the



special instance and request of the said Edmund, agreed by and between the said Thomas and the said Edmund, that the price or money to be paid by the said Thomas to the said Edmund for the said freehold estate and tenement in the said articles of agreement first mentioned, should be a certain sum of money, to wit, the sum of 500*l.*, part of the said sum of 1300*l.*, and that the price or sum to be paid by the said Thomas to the said Edmund, for the said customary tenements and premises in the said agreement, also mentioned, should be the residue of the said sum of 1300*l.*, to wit, the sum of 800*l.*, subject to the terms in the said agreement specified; and thereupon, afterwards, to wit, on, &c., at, &c., in consideration thereof, and that the said Thomas, at the like special instance and request of the said Edmund, had then and there undertaken and faithfully promised the said Edmund, to perform and fulfil all things in the said agreement contained, on his, the said Thomas's part to be performed and fulfilled as such purchaser as aforesaid, he, the said Edmund, undertook, and then and there faithfully promised the said Thomas, to perform and fulfil all things in the said agreement contained, on his, the said Edmund's part and behalf to be performed and fulfilled as such vendor as aforesaid; and although the said Edmund, in part performance of the said agreement, and of his said promise and undertaking, did afterwards, to wit, on, &c., at, &c., sell and convey the said freehold tenements and premises in the said agreement first mentioned to the said Thomas, and his heirs and assigns, at and for the said sum of 500*l.*, and the said Thomas then and there paid the sum of 500*l.* to the said Edmund, upon the terms aforesaid; and although the said Thomas was afterwards, to wit, on, &c., and from thence hitherto ready and willing to accept, receive, and take of and from the said Edmund, a surrender to him, the said Thomas, of the said customary tenements and premises in the said agreement mentioned, at and for the said sum of 800*l.*, upon the terms aforesaid, and to bear all the expenses, costs, and charges of such surrender, and all necessary assurances in that behalf, and to pay the said sum of 800*l.*, and complete the said purchase on his part and behalf in all respects upon the terms aforesaid, to wit, at, &c.; and although the said Thomas afterwards, to wit, on, &c., and oftentimes afterward, offered to the said Edmund to complete the said purchase of the said customary tenements and premises, with the appurtenances, upon the terms aforesaid, and requested the said Edmund to sell and surrender to him, the said Thomas, the said customary tenements and premises, upon the terms aforesaid, to wit, at, &c., yet the said Edmund, not regarding the said agreement, nor his said promise and undertaking, but contriving, &c., did not, nor would, on the said 2d day of February in the year last aforesaid, or at any other time, surrender or convey to the said Thomas the said customary tenements and premises in the said agreement in that behalf mentioned, or any part thereof, upon the terms aforesaid, but the said Edmund wrongfully neglected and refused ever to surrender the said customary tenements and premises to the said Thomas, according to the said agreement, and wrongfully discharged the said Thomas from any further performance by him of the said agreement on his part, contrary to the agreement, and the said promise and undertaking of the said Edmund, to wit, at, &c.

Then followed a statement of special damage.

There were several other counts. A general verdict was given for the plaintiff below, upon which final judgment was entered up, without opinion in the court below.

*Curwood* for the plaintiff in error. The first count discloses an illegal agreement, and the verdict and damages being general, the judgment below cannot stand. *Holt v. Scholefield*, 6 T. R. 691.

The agreement presents a clear case of champerty. The statute of 3 Ed. 1, c. 25, against champerty enacts, that "No officer of the king by himself, nor by other, shall maintain pleas, suit, or matters depending in the king's courts, for lands, tenements, or other things for to have part thereof, or other profit, by covenant made; and he that so doth shall be punished at the king's pleasure."

The subsequent statute of 28 Ed. 3, c. 11, is as follows: "And further, because the king hath heretofore ordained by statute that none of his officers shall take any plea or champerty, and by that statute other than officers were not bounden before this time, the king willeth that no officer nor any other, for to have part of the thing in plea, shall take upon him any businesses that are in suit; nor none upon any such covenant shall give up his right to another: and if any so do, and he be attainted thereof, the taker shall forfeit unto the king so much of his lands or goods as doth amount to the value of the part that he hath purchased by such undertaking: and for such attainder whosoever will shall be received to sue for the king before the justices, before whom the plea shall have been; and the judgment shall be given by them. But it is not to be understood hereby that one may not have council of pleaders or of learned men (for his fee), or of his relations or neighbours."

Although the first of these statutes applies in terms to the king's officers only, yet it is extended by the second: both show the sense of the legislature with regard to the offences of maintenance and champerty, and have never in application been considered as limited to the king's officers.

Then, champerty is an offence punishable at common law, and an agreement which stipulates for the commission of an offence cannot be supported.

In *Chesman v. Nainby*, 2 Ld. Raym. 1459, it was expressly holden that "if a bond is given with condition to do a thing against an act of parliament, and also to pay a just debt, the whole bond will be void." *Norton v. Simms*, Hob. 14, 1 Wms. Saund. 66 a, n. (1). Here the stipulation that the plaintiff below shall purchase the suit commenced by the defendant below goes to the whole agreement, and renders it void.

The Court stopped the counsel for the defendant in error, and holding that there was no champerty in an agreement to enable the bona fide purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase, more especially where such purchaser was not an officer of the king, the judgment of the court below was

Affirmed.

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### BUSHNELL and Others v. LEVI.—p. 315.

An officer of the sheriff of Middlesex, who resided and carried on his business in Middlesex, but who had also an office in London, Held, "to seek his livelihood in London," within the meaning of the London Court of Conscience Act.

THIS was an action for work and labour performed in Middlesex.

The plaintiffs having obtained a verdict for 4l. 18s.,

*Andrews*, Serjt.,—on an affidavit, that the defendant, at the time of the action and ever since, carried on the business of a sheriff's officer in Fetter Lane, in the city of London, under the firm of W. Levi and Son, and had rented offices or a counting-house and premises jointly with his son and par:

ner in Fetter Lane, and had sought and endeavoured to get his livelihood within the said city of London, by his aforesaid business of sheriff's officer,—obtained a rule nisi to enter a suggestion under the London Court of Conscience Act (39 and 40 G. 3, c. 104) to deprive the plaintiff of his costs. He relied on *Croft v. Pitman*, 5 Taunt. 649, 1 Marsh. 269, where the defendant, a coal merchant, was holden to be within the act, because he sold coals at an office in London, although he resided and had a wharf in Southwark. In *Gray v. Cook*, 8 East, 336, *Miller v. Williams*, 5 Esp. 19, and *Skinmer v. Davis*, 2 Taunt. 196, the defendants did not occupy any shop, stall, or place of business constantly, but only occasionally.

*Wilde*, Serjt., showed cause, on affidavits which stated that the defendant also carried on the business of a sheriff's officer in partnership with his son, at a lockup house for the sheriff of Middlesex, in Newman street, Oxford street, where he slept and resided, was rated as the occupier, and of which, jointly with his son, he paid the rates and taxes. It was also sworn that the sheriffs of London had no officer of the name of Levi.

*Wilde* distinguished *Croft v. Pitman*, on the ground that in that case the debt was contracted in London; here it was contracted in Middlesex; so that the defendant being an officer of the sheriff of Middlesex, and not an officer of the sheriff of London, and having a place of business in Middlesex, must be esteemed to carry on his business in that county, although he might have an office in London also. But

*The Court*, advertng to the language of the act, which applies to "any person seeking his livelihood in London," thought that after the decision in *Croft v. Pitman*, the defendant must be deemed to seek his livelihood there; and the rule was made

Absolute.

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ARNOLD, Clerk, and Others, v. The Bishop of BATH and WELLS, LEEVES, and DAVIES.—p. 316.

1. A bishop's register is evidence of the facts stated in it.
2. An allegation of a custom in parishioners to elect a curate is not supported by proof of such a custom in parishioners paying church rates.
3. Semble, an ecclesiastical custom (which is not immemorial) will not, though acted on for a long time, deprive a rector of his common law right to appoint his curate.

**QUARE IMPEDIT.** The first count of the declaration stated, that from time whereof the memory of man is not to the contrary, there had been and was a certain chapel with the cure of souls, which, during all that time, when full, had been and of right ought to have been, and still of right ought to be, served by a curate thereof, that is to say, the chapel of Burrington, situate in the county of Somerset, and which, during all the time aforesaid, had been and still was annexed to the parish of Wrington in the same county; that from time whereof the memory of man was not to the contrary, there had been and now was, and still of right ought to be, a certain ancient and laudable custom used and approved of within the said chapel, that is to say, that when and so often as the said chapel had become and been, or should become and be vacant, and upon every such vacancy happening, it had been, and should and might be lawful for the several persons being then respectively parishioners of the same chapel, or the majority of them in vestry assembled, due notice having been publicly given in the said chapel during or immediately after the performance of divine service there, of the day and time appointed for holding and assembling such vestry, to elect and nominate a clerk in holy orders to be curate of and for the said chapel of Burrington, and to present him to the person who for the time being should or might be

rector of the said parish of Wrington, for his approbation, in order that the said rector, if he found or finds the said clerk so elected and nominated a proper person to have and serve the said cure, might and should approve, and (after he should have taken an oath of obedience to him the said rector for the time being, and his successors) admit the said clerk to the said cure, and present him to the bishop of the diocese within which the said chapel was situated, for him, if found by the said bishop to be a fit and proper person to have and serve the said cure, to be licensed by him the said bishop to serve the same; that, in pursuance of the said custom, therefore, and on the said chapel becoming and being void by the death of one George Inman, clerk, then formerly incumbent thereof, to wit, on the 9th day of March, in the year of our Lord 1795, to wit, at the chapel aforesaid, in the county aforesaid, certain persons then respectively being parishioners of, and being then and there the majority of the parishioners of the said chapel, and then and there in vestry duly assembled, pursuant to such notice as in that behalf aforesaid before that time, to wit, on, &c., at, &c., duly given, did then and there elect and nominate one Sydenham Teast Wylde, then and there being a clerk in holy orders, and a proper person to have and serve the said cure, to be curate of and for the said chapel, and did then and there present him to the defendant, William Leeves, who then and there was and still is rector of the said parish of Wrington, according to the said custom, and that the defendant, William Leeves, did then and there approve the said Sydenham Teast Wylde, and did, after the said Sydenham Teast Wylde had taken such oath in that behalf as aforesaid, then and there admit the said Sydenham Teast Wylde to the said chapel, and did then and there present and nominate the said Sydenham Teast Wylde to the then Bishop of Bath and Wells (the said chapel being then and there within the diocese of the said bishop) to be by him licensed to serve the said cure, and the said Sydenham Teast Wylde was afterwards, to wit, on, &c., at, &c., duly licensed by the said bishop to serve the same accordingly; that afterwards, to wit, on the 12th of May, in the year 1826, the said chapel of Burrington became void by the death of the said Sydenham Teast Wylde, and yet was void; and by virtue of the premises and of the said custom, it then and there belonged to the then parishioners of the said chapel so in vestry assembled, such notice having been given in that behalf as aforesaid, or the majority of them, to elect and nominate a clerk in holy orders, being a proper person to have and serve the said cure as curate of the said chapel; that afterwards, to wit, on the 14th June, in the year 1826, to wit, at the chapel aforesaid, in the county aforesaid, the plaintiffs being then and there a majority of the parishioners of the said chapel, duly assembled in vestry (due notice having been previously, to wit, on the day and year last aforesaid, at the chapel aforesaid, publicly given in the said chapel during or immediately after divine service thereof, of the day and time appointed for holding and assembling such vestry) to elect and appoint a clerk in holy orders curate of the said chapel; whereupon the plaintiffs being and constituting the majority of the then parishioners of the said chapel so assembled in vestry as aforesaid, then and there elected and nominated James William Arnold to be curate of the said chapel, he the said James William Arnold being then and there a clerk in holy orders, and then and there a fit and proper person to have and serve the said cure; whereupon and by virtue of such election and nomination at such vestry so assembled as aforesaid, it belonged to the plaintiffs to present the said James William Arnold to the defendant William Leeves, so being such rector as aforesaid, for the approbation of him the said defendant William Leeves, as a fit and proper person to have and serve the said cure, so that he should and might, after he should have taken such oath.

as aforesaid, be, by the said defendant William Leeves, admitted to the said cure, and presented to the said bishop of the said diocese, in order that he the said James William Arnold, if he should be found by the said bishop to be a fit and proper person to have and serve the said cure, might be licensed by the said bishop to serve the same; but the defendants unjustly hindered them the plaintiffs.

The second count alleged a right in the parishioners of the chapel to elect and nominate a curate under a lost act of parliament of 11 Hen. 7.

The defendants Leeves and Davies pleaded to the first count, that the chapel was part and parcel of the rectory of Wrington; that it belonged to the rector to appoint the curate; that Leeves, in right of his rectory, appointed S. T. Wylde in 1795, and that on the 12th of May, 1826, Leeves, in the same right, appointed the defendant Davies, and presented him to the bishop; and concluded by traversing the custom set out by the plaintiffs.

In the plea to the second count, they set up the same title, and traversed the act of parliament.

In a third plea to both counts, they traversed the election by the plaintiffs.

The bishop disclaimed anything in the chapel except to license the ministers.

Issue was joined on the above traverses.

At the trial before *Littledale*, J., Somersetshire Summer assizes, 1828, the plaintiffs produced in support of their claim, the following documentary evidence:

1st. An entry in a book found in the registry of the Bishop of Bath and Wells, entitled,

"Registrum instrumentorum clericorum exhibit. in visitacōe trienniali Epāli Bathon. et Wellen. in anno 1606.

"BERRINGTON.

"Johannes Tristram clicūs ordinat. presbiter per Dūm Willūm Cestren. Epūm 8 Aprilis 1576, admiss. ad curā animar. in ecclīa ib". per Dūm Ricardum Forster, clicū nup. rectorem de Wrington juxtā consuetud. &c. 27 Septembris 1591. Licentiat. ad concionand. per Dūm Thomā nup. Bathon et Wellen. Epūm 7 Januar. 1588."

2dly. The following extract from the parliamentary survey of 1649:—

"Parish of Berrington. There is in it a church or chapel, being, as we conceive, a donative, worth, per annum, about three and forty pounds.

"The minister there hath usually been elected by the parishioners of Berrington, and approved of by the rector of Wrington. The tithes of corn, hay, wood, and teazles, payable out of the parish of Berrington to the parish of Wrington, are worth, per annum, 22*l*."

3dly. The instrument of the rector's approval and admission of Mr. Inman, bearing date 12th July, 1744, and preserved in the bishop's registry. By this instrument, Henry Waterland, the then rector of Wrington (after reciting the election and nomination of Inman by the parishioners of Berrington, their presentation of him to the rector for his approbation, and for the purpose of admitting him, according to the tenor of a certain statute relating to the said chapel), approved of, admitted, and presented Inman to be licensed to the said chapel.

4thly. The instrument of the defendant's, Leeves, approval and admission of Wylde, expressed in the same form as the instrument by which Dr. Waterland had approved of and admitted Inman.

The plaintiffs then proved, that, a day or two before the election of Arnold, a church rate was made, and that it was agreed at the election to go by that rate; that every one who was at the election, and whose name was on the rate, voted; the proxy of an absent person was refused, because

his principal's name was not on the rate; and the vote of one present, who was not on the rate, was admitted.

The defendants relied mainly on the following extract from the ecclesiastical survey of 26 H. 8:

"Wrrington, with the chapel of Berrington annexed. The rectory there is worth by the year, in demesne lands, 40s. Prædial tithes, 28l. Tithe of wool and lambs, 7s. Oblations, with personal tithes, 14l. 14s. 8d. In pence paid to the archdeacon of Wells, as of synodals, 7s. 6d. To the bishop, as of procurations, 16d. To the Abbot of Glastonbury, as a pension, 40s. And to a certain priest, celebrating in the said chapel annexed, for his stipend annually, by composition, 66s. 8d.:"

On an entry in the parish book of Burrington as follows:

"April 30, 1744. At a general meeting of the inhabitants of the parish of Burrington, notice being given on the Sunday before in the parish church, the Rev. Mr. George Inman was unanimously elected chaplain of the said church of Burrington, vacant by the death of Mr. Wilks, by us, whose names are hereunto subscribed, having a right to elect upon the account of paying four pounds to the said chaplain over and above his tithes:"

On another entry in the parish books of Burrington, of the election of Mr. Wylde to the cure on the 9th of March, 1795, in the same form as the entries touching the election of Inman:

And they objected to the admission in evidence of the plaintiff's first document, the register of visitations in 1606.

The document, however, was received, and a verdict was found for the plaintiffs, in which the jury also disposed of some objections made on the part of the defendants to the sufficiency of the notice of the disputed election, and of the rate on which that election appeared to have proceeded.

*Merewether*, Serjt., moved for a new trial, chiefly on the ground that the register of visitations of 1606 had been improperly received in evidence, as containing, not the original admission of the person named in it, but merely a statement made, it did not appear by whom, of transactions anterior to the date of the register;

And that the qualified custom, proved at the trial for such persons to vote as contributed to the church rate did not sustain the absolute right in all the parishioners, as alleged in the declaration.

He also moved in arrest of judgment that the plaintiffs ought to have shown a seisin, either in themselves or in those under whom they claimed; but that being unincorporated, and a mere fluctuating body, they were incapable of having such a seisin. *R. v. Marquis of Stafford*, 3 T. R. 646; *Russell v. Men of Devon*, 2 T. R. 667; *Farnworth v. Bishop of Chester*, 4 B. & C. 555; Com. Dig. Pleader, 3 I. 4.

But the judgment of the Court was confined to the other points.

*Wilde* and *E. Lawes*, Serjts., showed cause. The bishop's register was properly received in evidence. Registers, when brought from the proper custody, are evidence of the facts stated in them, and it has never been decided that further proof should be adduced of such facts. *Bullen v. Michel*, 2 Price, 399; *Bishop of Meath v. Belfield*, 1 Wils. 215.

As to the alleged variance in the proof of the custom, the best evidence of that custom is the parliamentary survey of 1649, in which document no mention is made of any qualification. The limitation of the right to those who paid rates is not mentioned previously to the year 1744, and it was probably then resorted to as affording the readiest means of ascertaining who were parishioners, and not with any view to narrow the suffrage.

*Merewether*. If the entry in the register had been the entry of an exhibit at the bishop's visitation, there would have been no objection to

receiving it in evidence; but it is the entry of a parol declaration as to a particular fact, of which the party making the declaration could have no knowledge but by general reputation; and general reputation is not admissible evidence of a particular fact: *Rex v. Eriswell*, 3 T. R. 707. As to the custom, there is no evidence of any common law custom, at least of sufficient validity to deprive the rector of his common law right to present; for in *Gape v. Handley*, 3 T. R. 291 n., Lord Mansfield said, "The restriction of the presentation to the select body is the most reasonable restriction that can exist: a popular election of a minister raises fumes and heats among the parishioners, and tends much to destroy Christian charity." The ecclesiastical survey makes no mention of the custom. The expression *juxta consuetudinem* in the bishop's register may apply to a mere ecclesiastical custom, which may exist after forty years, and need not be, like a common law custom, from time immemorial. And the parliamentary survey confirms this view of the case, by employing the word usually instead of immemorially. The usage, too, which has prevailed at the elections, of which evidence has been given, is indicatory rather of an ecclesiastical than a common law custom. The 4*l.* payment, in respect of which the parishioners appear to have voted, is probably the same charge which was paid by the rector at the time of the ecclesiastical survey, and the nomination of their curate was probably conceded to them in consideration of their relieving the rector of that charge.

BEST, C. J. The bishop's register was properly received in evidence; but as register attention has not been paid to the question whether this was an ecclesiastical or a common law custom, and as the attention of the jury ought to have been directed to that point, the cause must be tried again.

The register is evidence of the business transacted at the bishop's visitation: he there inquires how parishes are served, and how clergymen have been appointed; and these inquiries would lead him to ascertain whether a clergyman had been appointed under a custom or not; but the answers furnished to him would not show whether the custom were a common law or an ecclesiastical custom. In the present instance we must endeavour to ascertain that point from the usage. But the elections of 1744 and 1795 afford strong indications that this was not a common law custom, and are, besides, altogether at variance with the custom alleged in the declaration. When it appears that within 100 years the curacy was worth only from 40*l.* to 50*l.* a year, and that a portion even of that amount is made up of tithes, can it be supposed that the inhabitants have paid 4*l.* a year immemorially? It is observable, too, that no evidence has been given on the subject of the payment by the rector, mentioned in the ecclesiastical survey. The right of nominating the curate is by common law in the rector, and we should require a custom of the nature relied on in this action to be very clearly proved. Nothing is so likely to engender feuds in the parish, and bad feeling between the rector and his parishioners, as the depriving the rector of that right which he is best qualified to exercise. Inasmuch, therefore, as the evidence of this custom is not clear and satisfactory, the rule for a new trial must be made absolute.

PARK, J. It is desirable that the rector should have the nomination of all the clergymen under his control; he is the best judge of their principles and attainments, and the best able to take precautions against the holding forth one doctrine in the morning and another in the evening. But there ought to be more investigation as to the nature of the custom on which the plaintiffs sue; and, therefore, the rule for a new trial must be made absolute. I incline to think the bishop's register was properly received in evidence; the strict inquiries made at visitations render it a very authentic repository

of facts, as those who have attended at such meetings will readily perceive.

BURROUGH, J. I think that there ought to be a new trial in this case, for the reasons which have been stated. But I am further of opinion that the bishop's register ought not to have been received in evidence, at least as evidence of the custom. The words *juxta consuetudinem* are ambiguous, and unless the entry showed a clear immemorial custom, it ought not to have been admitted.

GASELEE, J., concurring in the propriety of a new trial, the rule was made Absolute.

### DOE, dem. DAVIES, v. CREED.

DOE, dem. DAVIES and CHEESE, v. CREED. — p. 327.

1. Where two elegits are issued the same day upon judgments signed in the same term, the sheriff may extend on each an entire moiety of the defendant's land, although the judgments are at the suit of different plaintiffs, and the inquisition on the second elegit recites, that a moiety has been extended on the first.
2. Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessor of the plaintiff.

THE lessors of the plaintiff, in these two ejectments, had obtained two several judgments in the same term against one Chinn; upon which judgments they sued out two writs of elegit, tested the same day and same term, and delivered them to the sheriff together, to be executed.

The inquisitions on both were taken, and dated 31st of May, 1825.

The inquisition on the first elegit, after finding the property that Chinn was seised of at the time of the judgment, and the persons by whom it was occupied, and setting out a moiety, stated the delivery of such moiety to Davies in the usual way.

The inquisition on the second, after finding Chinn to be seised of the same property in the hands of the same occupiers, proceeded as follows: — "A moiety of all which said hereditaments and premises hath been this day extended by me, the said sheriff, in a certain other action against the said E. Chinn, at the suit of J. Davies." It was then found that certain portions of the premises (there described) were a true and equal moiety of the said lands and tenements of Chinn; and the delivery of such moiety to Davies and Cheese was averred in the usual way.

The lessors of the plaintiff thereupon commenced the above actions, to obtain possession of the premises.

The defendant, who was not in occupation of any of the premises, but who claimed them under a conveyance from Chinn, was by rule of Court joined with the occupiers to defend as landlord; and by the terms of the rule, in case the occupiers should neglect to appear, the defendant might appear by himself and defend his title to the premises, he consenting to enter into the like rule as the occupiers in case they had appeared; the plaintiff to be at liberty in such case to sign judgment against the casual ejector, but execution thereon to be stayed till the Court should make further order; the defendant to admit himself to be in the actual possession of the premises.

The occupiers did not defend, and judgment was signed against them,



but they had been in occupation previously to the date of the judgments on which the elegits had issued.

At the trial of the causes, before *Gaselee*, J., last Hereford Summer assizes, it was among other things objected on behalf of the defendant in the first ejectment, that no proof had been offered of any notice to quit given to the occupier, and that without such notice the lessors of the plaintiff could not recover. The plaintiff was thereupon nonsuited.

Upon the second ejectment, evidence having been given of a disclaimer, the like objection could not be made; but it was urged that the inquisition on the second elegit was void, for delivering to the lessors of the plaintiff the whole instead of the half of the second moiety of Chinn's property.

The learned Judge, however, overruled the objection; and it appearing that the alleged conveyance from Chinn to the defendant was a gross fraud, a verdict was found for the plaintiff on this second ejectment.

On the part of the plaintiff,

*Andrews*, Serjt., obtained a rule nisi to set aside the nonsuit, and have a new trial in the first cause; and on the part of the defendant, *Ludlow*, Serjt., obtained a rule nisi to set aside the verdict for the plaintiff, and enter a nonsuit in the second cause.

The two rules were argued together.

*Andrews*, Serjt. The defendant could not in the first action take any advantage of the circumstance, that notice to quit had not been given to the occupiers of the premises in question. As they had suffered judgment by default, and he had been permitted to defend with a view to protect his own title, he was bound to rely on that alone, and could not take advantage of anything that had passed between the lessor of the plaintiff and the occupiers; for it might very well be that the lessor of the plaintiff might have no interest in disputing the claim of the occupier, and might have brought the ejectment solely for the purpose of defeating a claim of the defendant in a different right. It had, therefore, been decided in *Doe v. Williams*, Cowp. 621, that where a party defends as landlord, he cannot object that notice to quit has not been given to the tenants in possession. And the recent rule of Court in the King's Bench requires that in such a case the landlord shall admit himself to be in possession, and shall rely only on his own title, 4 B. & A. 196.

Then the two judgments being of the same term, and the elegits being both tested the same day, the execution of the second was regular, for there is no legal division of a day; the writ orders the sheriff to deliver to the plaintiff a moiety of the lands of which the defendant is seised on the day the writ comes to the sheriff's hand: so that, if two writs come the same day, the sheriff cannot do otherwise than give on each a moiety of the whole land possessed on that day. *The Attorney General v. Andrew*, Hardr. 23, is an authority in point; and in *Huyt v. Cogan*, Cro. Eliz. 482, and *Burnham v. Pain*, 2 Brownl. 97, which may be cited on the other side, it may be inferred that the writs were not delivered on the same day; for Comyns (Com. Dig. Exec. C 14) referring to those cases, lays it down, "if two have judgment, and one sues an elegit and has a moiety, and afterwards the other sues an elegit, the sheriff shall deliver but a moiety of the residue."

*Ludlow*, Serjt., contra. The defendant was entitled to object that notice to quit had not been given to his tenants. The tenants were in before the judgment, and an outstanding term, in whomsoever vested, is a bar to an ejectment. Besides, the lessor of the plaintiff, who claimed through Chinn,

ld not stand in a better situation than Chinn himself; and as the occu-

piers were tenants from year to year, Chinn himself could not have ejected them without proving a notice to quit.

As to the elegit, it has been clear law from *Huyt v. Cogan* to the present day, that where a second elegit is executed against the lands of the same defendant, the sheriff can only take a moiety of what remains after the execution of the first. The only authority to the contrary is Fitz. Abr. Exec. pl. 137, the credit of which is much shaken by a quod mirum interjected by the learned compiler. And though there seems to have been an exception in the case where the two judgments are of the same term, and in favour of the same party (for the case in Hardres goes no further) that proceeds on the fiction that the term is but one day; and so upon the second elegit, the sheriff gives a moiety of the lands of which the defendant was seised on that day. But where the inquisition on the second elegit recites the inquisition on the first, and so the sheriff admits himself to have received notice that one moiety is already gone, the fiction is excluded by the reality of the actual finding, and the sheriff can only give a moiety of that residue which the defendant is found to be seised of; especially where, as in the present case, the two judgments are in favour of different plaintiffs.

So, Vin. Abr. Exec. 594, is expressly in point: "If there be two judgments for 100*l.* each, and elegit on one, and inquisition finds he has twenty acres, and ten of them are extended, and then an elegit is sued upon the other, and inquisition finds he has twenty acres, and thereupon the other ten acres are extended, no audita querela lies; per *Holt*, C. J.: at which Sir Bartholomew Shower, at the bar, shook his head; whereupon *Holt* said on his word it was true. If there be two judgments, and the defendant is seised of twenty acres, and a moiety of them is extended upon one, and an extent goes upon the other, and inquisition thereupon finds him seised of twenty acres, without any notice of the former extent, and hereupon the other moiety is extended, this is well, though in truth a moiety of the remaining moiety ought to be extended."

BEST, C. J. I am clearly of opinion, that there is no foundation for the objection which has been made to the execution of the second elegit. That writ was given by the statute of West. 2, c. 18, the language of which is, quod vicecomes fieri faciat de terris et catallis, vel quod liberet omnia catalla, exceptis bobus et afiris carucæ, et medietatem terræ quousque debitum fuerit levatum per rationabile pretium et extentum. Undoubtedly the sheriff is to take only a moiety; but the question is. To what time do the words of the statute relate? I am of opinion they relate to the time of issuing the writ. The sheriff must take on each writ a moiety of the lands that the defendant has at the time of issuing that writ. Now, at the time when these two writs issued, the defendant had the whole of the lands in question, and the sheriff was, therefore, bound to take a moiety on each. This is the principle on which all the cases have proceeded. Upon a writ issued subsequently to a prior execution, the sheriff can only take the moiety of the moiety that remains; but if, at the time of issuing two writs, the defendant is in possession of the whole of his land, the sheriff may take a moiety under each; and there is no difference in the case whether the two writs are at the suit of the same or of separate parties, provided they are tested at the same time, and have relation to the same day. Such was the case in the present instance; and, therefore, if the sheriff were to take under each writ a moiety of what the defendant had at the time the writ issued, he would take one moiety under one writ, and the remaining moiety under the other. To this conclusion we must have come, even without the aid of a decision or

the point. But the case of the *Attorney-General v. Andrew* is an express authority the same way, and is referred to by Comyns as such. This authority is consistent with the writ and the statute; it guides the way to which justice would incline, and is impeached by no conflicting decision. The rule, therefore, which has been obtained on the part of the defendant must be discharged. We will take time to consider the other point respecting the notice to the tenants.

PARK, J., and BURROUGH, J., concurred.

GASELEE, J. I have looked through all the cases, and find no distinction between elegits under several judgments at the suit of the same plaintiff, and elegits under judgments at the suit of several plaintiffs.

It is plain, from the case of the *Attorney-General v. Andrew*, that upon two elegits of the same term, at the suit of the same plaintiff, the whole of the defendant's land may be taken; and there is no reason why the practice should be different where the judgments are at the suit of several plaintiffs, provided they and the writs be of the same term. However, independently of any decision, it is clear, upon looking at the statute, that the sheriff may extend under each writ a moiety of what the defendant was seised of on the day the writ issued. The rule for setting aside the verdict for the plaintiff must, therefore, be

Discharged.

On a subsequent day, (Feb. 7,) *Best*, C. J., said, that the rule for a new trial in the first cause must be made absolute.

Rule absolute accordingly.

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TAYLOR and Others, Administratrixes of FOLDER, v. LYON.—  
p. 333.

Declaration amended by allowing plaintiff to declare, on the same cause of action, as surviving partners instead of administratrixes.

THIS action, by Ann Taylor and Mary Folder, as administratrixes of Sarah Folder, deceased, was commenced 17th September, 1827, upon the defendant's acceptance of a bill of exchange. The letters of administration were dated 4th December, 1827.

A bill was filed by defendant in the Exchequer, and an injunction granted Michaelmas term, 1827.

The injunction was dissolved, on the merits, at the close of Trinity term, 1828.

The declaration was entitled 1st day of Michaelmas term, 1827.

Pleas, general issue, statute of limitations, and that plaintiffs were not administratrixes at the commencement of suit.

*Wilde*, Serjt., upon an affidavit that the plaintiffs were the surviving partners, as well as administratrixes of Sarah Folder, and that at the commencement of the action their attorney had inadvertently supposed the letters of administration to have been then granted, moved to amend the writ and declaration, by changing the description of the plaintiffs from "administratrixes" to "surviving partners," in which character the action might be maintained; or to alter the title of the declaration from Michaelmas term, 1827, to Hilary term, 1828.

The statute of limitations would have been fatal to any new action.

He cited *The Executors of the Duke of Marlborough v. Widmore*, 2 Str. 890, where the plaintiffs having declared as executors, on a promise

to their testator, and issue having been joined on a plea of the statute of limitations, the plaintiffs were allowed to amend by laying the promise as made to themselves.

*Taddy and Sparkie, Serjts., showed cause. In The Executors of the Duke of Marlborough v. Widmore*, the plaintiffs were only allowed to amend by laying the promise to themselves as executors, 4 Burr. 2449, Fitzgibb. 193, and a count on such a promise might have been joined with a count on promises to their testator. But a count on promises to plaintiffs as surviving partners cannot be joined with a count on promises to them in a representative capacity, or to the person whom they so represent. To allow the present amendment, therefore, will be in effect to allow the plaintiffs to commence a new and a different action, and at the same time to deprive the defendant of the advantage to which he would be entitled if that action had been commenced in the regular way. Besides, here there is nothing to amend by, which in *Green v. Rennet*, 1 T. R. 782, *Buller, J.*, says, is a circumstance by which the Court have always been guided.

**BEST, C. J.** Questions for amendment are questions for the discretion of the Court, which, on such occasions, is to be so exercised as to do justice between the parties. The defendant does not allege that he has been prejudiced by the death of any witness, and I think the amendment ought to be permitted.

**PARK, J.** Amendments are now generally allowed at every stage of the pleadings, for the advancement of justice. The question usually is, "Will any injustice be done by what is proposed?" and if not, the amendment is allowed. By allowing this amendment we shall prevent expense, and confer a favor on the defendant, instead of a disadvantage; for if he succeeds, he will obtain his costs, which he could not have done as the declaration originally stood.

**BURROUGH, J.**, concurred; and on payment of costs the rule was made absolute as prayed, the defendant having leave to plead *de novo*.

Rule absolute accordingly.

#### WRIGHT v. WALES. — p. 336.

Defendant, as *fenreeve*, having the care of certain lands, over which the plaintiff was making a road, asked him by what authority he acted; the plaintiff said, by authority of the magistrates, but did not exhibit any warrant, whereupon the defendant apprehended and took him before a magistrate: Held, that defendant was entitled to notice of action under 7 & 8 G. 4, c. 30, although the plaintiff was not committing a malicious injury.

**TRESPASS** and false imprisonment. At the trial before *Holroyd, J.*, last Suffolk assizes, it appeared that the plaintiff being occupied with a number of teams in carting and spreading beach and shingle, for the purpose of making a road over certain town lands of the parish of Walberswick, the defendant, who, as *fenreeve* of the parish, had the care of those lands, asked him by whose authority he was so employed. The plaintiff answered, by authority of the magistrates; but as he did not exhibit any warrant or order, the defendant, after warning him to desist, caused him to be taken into custody by a constable, and carried before a magistrate, who refused to receive the complaint, and discharged the plaintiff; whereupon this action was commenced. It appeared that the defendant thought he had a right to apprehend the plaintiff, and was not actuated by malice. The jury, under the direction of the learned judge, found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit instead, if the Court should be of opinion that the plaintiff was doing a wilful and malicious injury

within the meaning of 7 & 8 G. 4, c. 30, s. 24, or that the defendant was entitled to notice of action under that statute.

*Wilde*, Serjt., having obtained a rule nisi accordingly,

*Storks and Bompas*, Serjts., showed cause. It is perfectly clear that the plaintiff was acting in the exercise of a supposed right, and therefore was not a person liable to be apprehended as doing a malicious injury, *Looker v. Halcomb*, 4 Bingh. 183. But unless he were doing a malicious injury, the defendant could have no colour for apprehending him, and therefore was not entitled to the notice of action which the statute has required for persons doing anything "in pursuance of that act," (s. 41.) The apprehension of the plaintiff was not under colour of that act, much less in pursuance of it, and the defendant's supposing he had authority to apprehend, does not vary the case. It is not distinguishable from *Cook v. Leonard*, 6 B. & C. 351. There, the defendant, who, as constable of the town of Stroud, had, under a local act, authority to apprehend all vagrants within the limits of the town during the hours of keeping watch, attempted, during the day, to recover from a stable a dromedary which the plaintiff had been exhibiting, and being resisted by the plaintiff, assaulted and imprisoned him.

It was held, that as this was not done during the hours of watch, and the dromedary, not the plaintiff, was the object of attack, the defendant was not entitled to the notice of action provided for persons doing anything in execution of or under the authority of that act, although persons exhibiting beasts in the streets were subject to a penalty under the same act. And *Bayley, J.*, said, "Where an act of parliament requires notice before action brought in respect of anything done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of parliament, but extend to all acts done *bonâ fide* which may reasonably be supposed to be done in pursuance of the act. But where there is no colour for supposing the act done is authorised, then notice of action is not necessary. And where an act of parliament says, that in case of an action brought against any person for anything done in pursuance or in execution of the act, the defendant shall be entitled to certain privileges, the meaning is, that the act done must be of that nature and description that the party doing it may reasonably suppose that the act of parliament gave him authority to do it. I think that, in this case, the defendants had no reasonable grounds for thinking that the act of parliament gave to them or to the commissioners, under whose authority they acted, any power to remove the dromedary from the place where it was at the time when they attempted to remove it, and that being so, I am of opinion, that the rule for a new trial must be made absolute."

*Wilde* replied, that the defendant had, as *fenreeve*, the care of the land which the plaintiff was injuring; and the plaintiff having declined to exhibit the authority under which he was committing the injury, the defendant was bound to suppose he was acting maliciously: so that the apprehension was *bonâ fide* in pursuance of the act, although the magistrate afterwards did not find sufficient reason for the detention of the plaintiff. And *Gaby v. The Wilts and Berks Canal Company*, 3 M. & S. 580, has decided, that a defendant who acts *bonâ fide* under colour of a statute, may be entitled to notice of action where he has fallen into an error, although the party complaining against him may not be a wilful trespasser, or otherwise an offender against the statute. Such notices are required for the protection of those who err *bonâ fide*, and if not extended to them, would be useless, for persons acting legally do not want them.

*PARK, J.* I am clearly of opinion, that the defendant in this case was entitled to notice of action. If he had been acting legally, he would not

have wanted the protection afforded by the notice. But if he made a mistake when he had reason to suppose he was acting in pursuance of the statute, he was entitled to the protection given. *Gaby v. The Wilts and Berks Canal Company* is in point.

BURROUGH, J. There can be no doubt the defendant has acted illegally; but it is equally manifest he had reason to suppose he was acting under the statute, and, therefore, he is entitled to the notice required.

In *Holton v. Boldero*, in the time of Lord Mansfield, the defendant, a magistrate, having ordered his groom to saddle a horse, the groom said, "I'll be damn'd if I do," whereupon the defendant committed him. The groom having sued him for false imprisonment, was nonsuited, because his action was laid in the wrong county, it being holden, that the defendant, having supposed he had a right to commit, was entitled to be sued as a magistrate, although he had acted without jurisdiction.

GASELEE, J. In *Cook v. Leonard*, the Court said the defendants had no colour for supposing they had authority for what they did; here I cannot say that the defendant had no colour for supposing he ought to apprehend the plaintiff, and, therefore, this rule must be made

Absolute.

BEST, C. J., was at chambers.

#### ALCOCK v. COOK and Another.—p. 340.

Although the Duchy of Lancaster is held by the king separately from his crown, a grant of duchy property is subject to the same incidents as a grant from the crown. Therefore, an immediate grant to A. in fee, under the duchy seal, of property which was in the possession of B. under an unexpired lease from the duchy for years, (such lease not being recited in the grant) was held void, notwithstanding there had been a user under the grant from the date of it (1631) to 1760.

TROVER for a bowsprit. At the trial before *Best, C. J.*, Lincoln Summer assizes, the plaintiff claimed the bowsprit under a right to take wreck in the parish of Sutton, in Lincolnshire, and adduced the following evidence in support of his title:

First, An extract from Domesday-book, by which it was proposed to show that Sutton was part of the manor of Grendham or Greetham.

Secondly, A grant by Charles I. (6 Car. 1631) under the Duchy of Lancaster seal to Charles Harbord, Christian Favell, and Thomas Young, and their heirs (under whom the plaintiff claimed) of (among other manors, lordships, castles, hundreds, &c.) the manor of Greetham, in the county of Lincoln, with all its rights, members, and appurtenances, the reeveship of Greetham, and the bailiwick of Greetham, and all lands, tenements, rents, and hereditaments whatsoever in Greetham and various other places (but not mentioning Sutton) or in any or either of them, or elsewhere in the said county of Lincoln, called or known by the name of the lordship or manor of Greetham aforesaid, to the said lordship or manor, reeveship or bailiwick of Greetham in any wise belonging or appertaining, or as member, part, or parcel of them or any of them being heretofore had, known, accepted, occupied, used, or reputed, with all their appurtenances, (which said lordship or manor of Greetham, and other the premises before granted, were, by a particular thereof, mentioned to be altogether parcel of the ancient lands and possessions of the Duchy of Lancaster, in the county of Lincoln) and all and singular granges, farms, &c., and all rents, revenues, and services, rents-charge, rents-scot, &c., yearly rents, increased rents, fee farms, &c., courts leet, &c., and all that to courts-leet did in any wise belong, &c., immunities, acquittances, and hereditaments whatsoever, with all and singular their rights, members, and appurtenances, of what kind or nature soever they be,

or by what name soever they are known, deemed, called, or acknowledged, situate, lying, and being, issuing, growing, renewing, happening, or arising in or within the lordships, manors, hundreds, towns, places, fields, parishes, or hamlets aforesaid, or in or within any or either of them, or elsewhere, or wheresoever to the aforesaid castles, lordships, manors, hundreds, messuages, lands, tenements, and hereditaments, and other the premises by those presents before granted or mentioned so to be, to any or either of them, or to any part or parcel thereof in any wise belonging, appertaining, incident, appendant, or incumbent, or as member, part, or parcel of the same, being at any time theretofore had, known, accepted, occupied, and demised, leased, or reputed, and the reversion, &c., dependent or expectant of, in, or upon any gift or gifts in fee-tail, or any demise or grants for the term or terms of life, or lives, or years, and also all rents reserved upon any demise or grant, demises or grants:

And by the same letters patent the said king did also grant unto the said Charles Harbord, Christian Favell, and Thomas Young, their heirs and assigns, that they, their heirs and assigns, should from thenceforth for ever have, hold, and enjoy within the aforesaid castles, lordships, manors, hundreds, lands, tenements, and hereditaments, and all and singular other the premises thereby granted, as many, as great, such, the same, and the like courts-leet, views of frankpledge, hundred courts, law days, assize and assay of bread, wine, and beer, goods and chattels waived, estrays, deodands, escheats, reliefs, heriots, free-warrens, hawkings, huntings, and all other rights, jurisdictions, and franchises, liberties, privileges, customs, immunities, acquittances, profits, commodities, advantages, emoluments, and hereditaments whatsoever, as and which, and as fully, freely, and wholly, and in as ample manner and form as any abbot or prior of any late monastery, abbey, or priory, or any Duke of Lancaster, or any other person or persons at any time having, possessing, or being seised of the aforesaid castles, lordships, manors, messuages, lands, tenements, and hereditaments, and other premises thereinbefore granted or mentioned so to be, or any parcel thereof, ever had, held, used, or enjoyed, or ought to have had, held, used or enjoyed in the premises thereinbefore granted by reason or pretext of any act or acts of parliament, or of any charter of gift, grant, or confirmation, or by reason of any letters patent by the said king or any of his progenitors or ancestors then late kings or queens of England theretofore had, made, granted, or confirmed, or by reason or pretext of any lawful prescription, use, or custom theretofore had or used, or by any other lawful means, right, or title whatsoever; and as fully, freely, and wholly, and in as ample manner and form as the said king, or any of his progenitors or ancestors, then late kings or queens of England, had had or enjoyed, or ought to have had or enjoyed in the premises thereinbefore granted or mentioned so to be, or in any part or parcel thereof, or by reason or pretext of the premises or of any parcel thereof: except always nevertheless, and out of that grant altogether reserved all knight's fees, wards, wards and marriages of the premises, and all services for or in respect thereof, and all advowsons, donations, free dispositions, and right of patronage of all and singular rectories, churches, vicarages, chapels, and all other ecclesiastical benefices whatsoever to the premises, or any or either of them in any wise belonging, appertaining, incident, appendant, or incumbent, and also except all royal mines of gold and silver, being or to be found within or upon the premises, and all prerogatives to the same mines belonging.

Thirdly, In order to show that the reversion of the right to wreck was vested in King Charles at the date of the preceding grant, the plaintiff gave in evidence a lease from King James the First to one Livingstone, of (inter

alia) all wrecks of the sea within the honour of Bolingbroke, which, by other evidence, was shown to comprise the manor of Greetham.

The following is an abstract of the lease:—

“Indentures of lease (5th Jan., 12 Jac. 1) between King James I. of the one part, and John Livingstone, Esq., of the other part, whereby the said king granted, and to farm let to the said John Livingstone (inter alia) all and singular the profits and commodities happening within the honour of Bolingbroke, parcel of the duchy of Lancaster, in the county of Lincoln, of the goods and chattels, and debts and credits whatsoever of felons, felons of themselves, and fugitives, clerks convicted, persons outlawed, deadlands, waifs, estrays, and wrecks of the sea, as well in the accounts of the bailiffs and ministers of the said honour of Bolingbroke aforesaid, accountable, as otherwise, within the said honour, to the said lord the king, answered or to be answered: To hold the same unto the said John Livingstone from Michaelmas then last, for the term of thirty-one years, at the yearly rent of 6*l.*, and a moiety of all profits, amounting in themselves to 50*l.* and upwards.”

Fourthly, The plaintiff gave in evidence certain proceedings in a suit in the Duchy Court of Lancaster, in the 8 Charles I., relative to the right of wreck within Sutton among other places, wherein the Attorney General of the duchy, on the relation of Charles Harbord, the Surveyor General of the duchy (and one of the grantees under the letters patent from King Charles) was plaintiff, and one Rogers was defendant. In the information the lease of 12 Jac. 1 to Livingstone was recited; and in the information and decree Sutton was mentioned as within the manor of Grendham, alias Greetham, and Greetham within the honour of Bolingbroke; but the defendant did not justify for Sutton.

Fifthly, Testimony was given of the undisputed exercise of the right by those under whom the plaintiff claimed till about 1760; after which it appeared the defendant Cooke, and those from whom he inherited, had claimed the wreck over the district in question, and had frequently taken it.

On the part of the defendant, it was objected that wreck was a royal prerogative, and, therefore, would not pass by general words,—the only words supposed to convey it in the grant of 6 Car. 1.

That even if it could pass by such words, Sutton not being mentioned in that grant, no intention appeared to convey wreck in Sutton; and,

Lastly, That in point of fact Sutton was not within the manor of Greetham.

A verdict was taken for the plaintiff, subject to the decision of the question on the grant which was reserved for the consideration of the Court; as also, whether, if the grant were void, the evidence of user were sufficient to establish a right by prescription.

*Adams*, Serjt., moved accordingly for a rule nisi to set aside the verdict and enter a nonsuit, or have a new trial, on the grounds above stated.

To show that wreck is a royal prerogative, he referred to 17 Edw. 2, c. 11; and that a prerogative in the hands of a subject becomes a franchise; Com. Dig. Franchise; that a prerogative right will not pass by general words; Com. Dig. Grant (G 6, 7) and *Heddy v. Wheelhouse*, Cro. Eliz. 591, which case was recognised as law by the case of *The Abbot of Strata Mercella*, 9 Rep. 24.

With respect to the fact, whether or not Sutton was parcel of Greetham, it was contended that the meaning of the passage in Domesday had been mistaken.

A rule nisi having been granted,

*Wilde*, Serjt., showed cause. The authorities which have been cited on



the subject of the grant of a prerogative right by the crown are not disputed. But the grant on which the plaintiff relies is not a grant from the crown. It is a grant from the Duke of Lancaster; and by 1 Edw. 4 it is enacted, that the Duchy of Lancaster shall be held by the king separate, and perpetually, as an inheritance distinct from the crown, as largely as ever it had been held by the Duke of Lancaster. This was enacted to secure the king in those unsettled times an honourable retreat in case of his being deprived of the crown. (4 Inst. c. 36, p. 205.) Grants of duchy lands are made not under the great seal, but under the duchy seal, and are subject to the same incidents as a grant by a private person.

Then, although Sutton is not mentioned in the grant, it is clear from the decree in the Exchequer, that it is part of the manor of Greetham; and the intention to pass all that belonged to the duchy in that manor is abundantly manifest. That the right to wreck was in the duke, at least in reversion, appears from the lease of it to Livingstone. The general words in the grant are as comprehensive as it is possible to employ; and the exceptions expressly made, as of gold and silver mines, &c., lead to a strong inference that everything was meant to pass except what was specifically excepted.

The sufficiency of the user to establish a right by prescription was not relied on: but it was contended there was evidence sufficient to show Sutton to be parcel of Greetham.

*Adams* in support of his rule.

Although the duchy of Lancaster is holden separately from the crown, a grant of duchy property is subject to all the incidents of a grant of crown property. *Regina v. Archbishop of York*, Cro. Eliz. 241, Plowden, 217, 4 Inst. 209. And not only is it clear that in a grant by the crown wreck will not pass under general words, but it is equally clear that an immediate grant by the crown in fee or tail of property in the possession of a person other than the grantee, under an unexpired lease from the crown, not recited in the grant, is void. *Case of Alton Woods*, 1 Rep. 26, Earl of Rutland's case, 8 Rep. 57 a, Com. Dig. Grant, 9, 10, Roll. Abr. Prerogative, 9.

Here, even if Sutton were within the grant of 6 Car. and wreck would pass under the general words of that grant, yet the grant was void: for it is a grant to Harbord and others in fee, with immediate possession, although the right to wreck was in the possession of Livingstone, under an unexpired term of years, which is not recited in the grant.

Upon examining the extract from Domesday, the Court were of opinion that Sutton was not within the manor of Greetham; but judgment was given on another point.

*Cur. adv. vult.*

BEST, C. J. The points which were reserved at the trial were, first, whether, under the deed of 6 Car. 1 (supposing Sutton to be within the manor of Greetham), wreck is conveyed to the person to whom that grant was made, and through that person to the plaintiff; and, secondly, supposing wreck not to be conveyed, whether the parol evidence is sufficient to support a prescriptive claim.

I will shortly dispose of the second question. The parol evidence cannot support a prescriptive right to wreck, because it appears clearly from the information in the Duchy Court, that all this property was in the crown as late as in the reign of Charles I. If it was in the crown as late as the time of Charles I., the plaintiff could not have evidence from whence a jury might infer that it was in those whose estates the plaintiff holds, from time of memory. It seems to me, therefore, to be impossible (strong as the evi-

dence may be) that the plaintiff can make out, in this case, a title to wreck by prescription.

That brings me to the other question, whether or not the deed of the 6 Car. 1 conveys wreck. Now, two points have been made on that deed; first, that wreck will not pass under general words; and, secondly, that the grant is void, as granting in possession that of which the crown had only the reversion. There can be no doubt that Sutton was a place the wreck in which was leased by indenture in the 13 Jac. 1, to Livingstone; that indenture is a lease from the king; and it is material to attend to this circumstance, that every lease from the king must be enrolled. This has on its title, "from the 9th to 13th James I., folio 140." It is made between King James of the one part, and John Livingstone, Esq., one of the grooms of the chamber of the king, of the other part. It grants wreck, and also all and singular the profits and commodities happening and arising within the whole honour of Bolingbroke (it is taken that Greetham is a part of the honour of Bolingbroke), parcel of the Duchy of Lancaster, in the county of Lincoln, to Livingstone, for thirty-one years. In the decree in the Duchy Court of Lancaster, this lease to Livingstone is recited as an existing lease. Now, at the time the decree in the Duchy Court of Lancaster was pronounced, the grant of the 6 Car. 1 had been executed: the lease, therefore, was an existing lease at the time of the 6 Car. 1. This brings us to the question, whether, as the king had granted a lease of this property, and had not recited that lease in the grant of the fee in perpetuity, the latter grant was not, by the common law of England, altogether void? We are of opinion, that it was altogether void. We take it to be a principle of the common law of this country, that if the king makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the king has been deceived in that grant, and, therefore, that the grant is void. The grant, indeed, does not contain the word Sutton; but I am taking it now, that Sutton is a part of Greetham, and the conveyance applies to Greetham in all its parts. If Sutton be not part of Greetham, the plaintiff is a perfect stranger, and cannot have the least pretence to maintain this action. Assuming, however, that Sutton is within Greetham, in our opinion, it is not well conveyed; because, having been before granted by lease, and that lease not being recited, the king has proposed a grant which he cannot carry into effect. Having already leased the right of possession, he proposes, by this grant, to convey the same right of possession to another person. Now, it would be inconsistent with the king's honour (and, as it is stated in a case to which I shall presently refer, the common law has no object that is dearer to it than to preserve that honour), it would be inconsistent with the king's honour that he should grant the right of possession in the same thing to two. And, therefore, the latter grant is altogether void. If the king is deceived in his grant, it is perfectly clear the grant is void. It cannot be supposed, unless he is deceived in his grant, that he would grant to A. that which he has already granted to B.: that would be giving occasion to litigation, which it is always the object of the king to prevent. I must, however, guard the observation I am now making. The attention of the Court has been called to the circumstance of this being a lease from the king, which must be enrolled; and the doctrine which I am now laying down is applicable only to grants so enrolled: because, if an individual grants a lease, and the estate of which that individual grants a lease afterwards comes to the king, if the king regrants that, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. The

doctrine that I am delivering is applicable to a case where the subject cannot be deceived, and he must be deceiving the king; for, if the king's prior lease be enrolled, the subject has the means of knowing the existence of that lease, and it is his duty to inform the king of its existence. This lease, granted by James I., was a lease enrolled, and the persons under whom the plaintiff claims, when they accepted the grant of the 6 Car. 1, had the means of knowing of the existence of the lease. In the case of the Earl of Rutland, it was decided that where one is an officer for life, if the king, without reciting that such a one was an officer for life, grants the office to another for life, the second grant is void for want of such recital; but no book says that if the king recites the first grant, and also recites that the officer is alive, this last grant shall be void for want of certainty. It will be seen that the present case turns on precisely the same principle. If the king grants an office for life, and grants the same office to another, it might be argued that the two estates might co-exist, because the second grant might give an interest after the first life is determined. But still, it is void altogether. Why? Because it professes to give an immediate interest, and that immediate interest the king cannot give, because the office is full, and there is a possibility that the king has been deceived. But if there had been a recital of the former grant, and also a statement of the fact that the former grantee was still alive, it is then clear that the king could not have been deceived, and the grant will have the effect of giving to the person in whose favour it is made, the estate, the office, after the life of the first grantee. Apply that principle to the present case: if the king had recited this lease, although he had granted the fee-simple during the existence of that lease, it would have been clear from the recital that he knew of the lease; but he does not recite the lease, and therefore it must be taken, when he makes another grant which cannot be immediately carried into effect, although according to its terms it is immediately to be carried into effect, that the king is deceived, and that therefore the second grant is void. The next case, that of Alton Woods, is entitled to the greatest consideration, because it came on, on a writ of error, before eight Judges, that is, all the Judges of England except the Barons of the Exchequer. The opinion of the Judges has also the confirmation of my Lord Chancellor Egerton, afterwards my Lord Ellsmere. The Judges in that case say, When the king makes a lease for life or years, and afterwards, without reciting this lease, grants the land in fee or in tail, although the king is stated to make this grant *ex certâ scientia et mero motu*, the said grant, without recital, is void by reason of the common law, because the king is deceived in his grant when he intends to grant that in possession which cannot take immediate effect, which the king doth propose and intend.

Afterwards Lord Keeper Egerton says, the opinions of the Judges are perfectly satisfactory to me. My Lord Treasurer expressed the same opinion; and the Lord Keeper says, the king ought to be informed of his own estate, whether it be in possession or reversion. So that my Lord Keeper distinctly states the principle on which we are now putting this case: "You, the subject, who knew of the lease, ought to inform the king of the lease, and then you will see whether he will make a grant which he cannot completely carry into effect during the existence of that lease." In *Com. Dig. tit. Grant*, (G) 10, and in *Roll. Abr. tit. Prerogative of the King*, 9, a great number of cases, which it would be a waste of time to state to the Court, are collected, in which the distinction is taken which I have before mentioned, that if a lease from the king be enrolled, a subsequent grant of the same estate, not reciting the lease, is void. So that the doctrine of these two cases, which has been confirmed by several others, has become

the settled law of the land, and has been adopted into the most respectable text books.

But it has been argued that these lands belonged to the Duke of Lancaster, and that the statute of Henry IV. separates the lands of the Duke of Lancaster from the lands of the king. That is perfectly true; but although the lands are separate, by whom are they held? Are they held by a mere Duke of Lancaster? Or, when the king, as Duke of Lancaster, is the identical person, are they held by the king? Does the king descend from his high estate, to hold lands in any part of the kingdom upon different terms from those on which he holds all his estates? It would be inconsistent with the dignity of the king that he should do so; and, therefore, it has been decided, that, although he holds lands as Duke of Lancaster, he holds them as king also; and that all the prerogative and privileges of the king belong to him with reference to those lands, the same as they do with reference to lands which belong to him immediately in right of his crown.

In the case of *The Queen v. The Archbishop of York*, the question was, Whether a double and treble usurpation of an advowson put Queen Elizabeth out of possession of an advowson which she had in the right of the Duchy of Lancaster? and it was adjudged that it did not. What is the reason given for it?—"for she had her privilege in this as if it had been in her in right of the crown." Here is an express opinion of the whole Court that the king or queen has the same privilege with respect to the duchy lands that they have with respect to lands which belong to the crown.

In Plowden's Commentaries, 217, which is called the great case of the duchy of Lancaster, in which a question was referred to all the Judges to give their opinion with respect to certain leases that had been granted by King Edward VI. during his minority, the Judges used these words, "and so it seemed to them that the intent of Henry IV. and the charter and act of parliament were only to separate the lands, &c., of the duchy of Lancaster from the hereditaments of the crown, in order that they might remain in the person of the king so long as God granted that the crown and the duchy do continue together in the blood of the Duke of Lancaster and the mother of Henry IV., and if the crown should be taken from the blood of the duke, that the duchy should remain his, and thus the charter and act are satisfied without derogation to the person of the king, or the destruction of the dignity or pre-eminence which the law attributes to the king." Nothing can be more express than this;—he has separate estates: estate A. belonging to his crown estate, and B. belonging to his duchy of Lancaster. Although he holds A. as belonging to his duchy, he holds it also as king, and he has the same privileges and immunities as he has with respect to his other property; and so the Judges determined in that case. Although Edward VI. had granted a lease of the estate before he was twenty-one, that lease, which would have been bad in case he had been mere Duke of Lancaster, yet, as he was also king of England at the same time, was good. Lord Coke puts this very strongly in 4 Inst. 209. "All this appeareth by that great and grave resolution of the case of the duchy of Lancaster, reported by Mr. Plowden, that no statute now in force doth separate the duchy from the person of the king, nor to have the person of the king separate from the duchy, nor to make the king duke of Lancaster, having regard to the possessions of the duchy, nor to alter the quality of the person of King Henry VII., but only that the king should have to him and his heirs the said duchy separate from his other possessions. In which case the duchy at least was joined to the person of Henry VII. and to his heirs, and the person of the king remains as it did before; for nothing is said to the quality of the person of the king, nor to the alteration of his name, and the person of the king shall

not be enfeebled, because the duchy is given to the king and his heirs, but remains always of full age as well as to gifts as grants by him made as to administration of justice; whereupon it was resolved, that leases made by Edward VI. being within age, of lands, either within the county of Lancaster, or without, parcel of the duchy (the royall and politick capacity of the king being not altered), were not voidable by his not being of age: a just resolution, as tending to the safety and quiet of purchasers and farmers, and proveth directly that the royal and politic capacity of the king being not altered (as to these possessions), the letters-patent of the king of these possessions under the duchy seal are of record: and we find no opinion in our books, or any thing in any record, that we remember, against this." This is abundantly satisfactory, and sufficient to show that there is no distinction between the privileges of the king as Duke of Lancaster, and the prerogatives of the king as king of England. If it be so, then reverting to what I have already stated, that by the prerogative of the king, if the king is deceived in his grant, the grant is altogether void; and it appearing by decided cases, that it must be taken that the king is deceived in his grant when he grants that which he cannot give according to the terms of his grant; it appearing also, that at the time the grant of 6 Car. 1 was executed, the property granted was already in the possession of Livingstone, under a lease for years, and that that lease had several years to run; the grant of the 6 Car. 1 is altogether void; and for these reasons we are of opinion a nonsuit should be entered.

Rule absolute for entering a nonsuit.

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DAVIS v. RUSSELL and Others. — p. 354.

1. Defendant, a constable, being told by A: that plaintiff had robbed her, and the information being countenanced by a supposed intercepted letter which was shown to him, apprehended plaintiff, a respectable inhabitant of Cheltenham, at her lodgings, and took her from her bed at night to prison. The charge proving unfounded, plaintiff sued him for the false imprisonment; and the Judge having directed the jury to consider whether the foregoing circumstances afforded the defendant reasonable ground to suppose the plaintiff had committed a felony, and whether, in his situation, they would have acted as he had done, — Held, that this direction was substantially correct.
2. Held, also, that, under the circumstances, the degree of coercion resorted to by the defendant was not excessive.

TRESPASS for assault and false imprisonment. Plea, not guilty.

At the trial, before *Gaselee, J.*, last Gloucestershire assizes, the plaintiff, an elderly female, proved that on the 27th of January, 1827, between ten and eleven at night, the defendants, without producing any warrant, took her from her bed at her lodgings in Cheltenham, and conveyed her to prison, where she remained till the next morning, when she was carried before Mr. Capper, a magistrate, upon a charge of theft, which was ultimately dismissed.

The defence was, that, in the month of November preceding, a robbery had been committed in the house of Ann Hamerton, a young milliner at Cheltenham, with whom the plaintiff at that time lodged; that upon that occasion the plaintiff's trunk had been broken open, and that a 10*l.* note, and many other articles, had been taken out.

The plaintiff, shortly afterwards, went to reside in the house from which the defendants took her.

On the 27th of January following, Miss Hamerton showed the defendant Russell, the superintendent of the Cheltenham police, a letter addressed

to the plaintiff at Miss Hamerton's house, and bearing the Cheltenham post-mark; and alleging, that upon looking in at the ends, she believed it to contain some allusion to the robbery, induced Russell to break it open.

The letter, which was anonymous, purported to come from an accomplice in the robbery, residing in London, and demanded money at the hands of the plaintiff, as a joint perpetrator of the offence.

Miss Hamerton also told Russell that, four days after the robbery, a letter had arrived for the plaintiff in the same hand-writing, with the London post-mark, and that the plaintiff had refused to show it; she then expressed her suspicions of the plaintiff being concerned in the robbery, and said she thought Russell ought to take her into custody.

This, after reading the above letter, Russell, assisted by the other defendants, proceeded to do; the door of the house being opened to him when he knocked.

On cross-examination it appeared, that on the 8th of January preceding, the plaintiff having found, secreted under Miss Hamerton's bed and on her person, sundry of the articles which had been stolen from the plaintiff's trunk, took Miss Hamerton before Mr. Capper, the magistrate, charged her with the theft, and identified the articles found under her bed, as the articles which had been stolen from the plaintiff's trunk. The defendant was present upon that occasion. Mr. Capper, however, dismissed the charge. (a)

The learned Judge said, that if the constable had a complaint made to him under such circumstances as to induce him to believe it true, he had a right to take into custody the party complained against, provided the facts were such as to warrant an apprehension; and he desired the jury to consider whether the statement they had heard satisfied them, looking at the letter and the other facts, that the constable had reasonable ground to suppose the plaintiff implicated in the felony with which she had been charged; and whether, standing in his place, they would have acted as he had done.

A verdict having been found for the defendants,

*Russell*, Serjt., moved for a new trial, on the ground, first, that the question, whether or not the constable had reasonable and probable cause for apprehending the plaintiff, was a question of law which ought not to have been left to the jury; and, secondly, that the jury ought to have been directed to consider, whether, supposing the arrest justifiable, the circumstances of the case warranted the degree of coercion resorted to by the defendants.

First, the defendant, as constable, could only excuse himself by giving in evidence, under the general issue, such circumstances as would have amounted to a justification if pleaded by a private person; *Mure v. Kaye*, 4 Taunt. 35; and it is clear that on such a plea, if the facts were admitted by demurrer, the sufficiency of them to excuse the defendant would be a question for the Court. *Hill v. Yates*, 8 Taunt. 182. Lord Coke says, (1 Inst. 52,) "If treason or felony be done, and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he

(a) Miss Hamerton was, on the same evidence, tried and convicted for the robbery at the ensuing Gloucester Spring assizes; being then sentenced to seven years' transportation, she committed suicide the next day. Upon that trial, the anonymous letter, on the credit of which Russell had apprehended the plaintiff, was proved to have been written by Hamerton.

On the proof supposed to be afforded by that letter, the plaintiff, when charged before Mr. Capper on the 28th of January, had been committed to prison for fifteen days, for further examination; at the expiration of that time, for five days more, and then dismissed.

must show in certainty the cause of his suspicion; and whether the suspicion be just or lawful, shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a habeas corpus, &c.

In *Sutton v. Johnstone*, 1 T. R. 507, *Eyre, C. J.*, in delivering the opinion of the Court, says, "In our law, justification is a conclusion of law which necessarily results from a given state of facts."

And in the argument for the defendant in error, the doctrine was laid down and assented to as follows:

"What therefore is probable cause is the great matter for consideration. The definition of probable cause is, such conduct in an individual accused as will warrant a legal and reasonable suspicion of offence against the law in the mind of the person accusing, so as that a court can infer a prosecution to have been taken upon public motives. It is a mixed question of fact and law. What circumstances existed, and what knowledge the prosecutor had of them, is a question of fact: but when the facts are known, and the mind of the prosecutor is laid open to the jury by evidence, then whether it were a reasonable or an unreasonable cause of proceeding is a question of law."

In the reasons given by Lord *Mansfield* and Lord *Loughborough* in the same case, the law is stated to the same effect. "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law: and upon this distinction proceeded the case of *Reynolds v. Kennedy*, 1 Wils. 232."

This may be illustrated from the rule as to the reasonable notice of the dishonour of a promissory note or bill of exchange. "What is reasonable notice is partly a question of fact and partly a question of law. It may depend in some measure upon facts, such as the distance at which parties live from each other, the course of the post, &c. But wherever a rule can be laid down as to the reasonableness, that should be decided by the Court, and adhered to by every one for the sake of certainty." (By Lord *Mansfield* in *Tindall v. Brown*, 1 T. R. 168.)

The doctrine, that what is reasonable is a question for the Court, pervades the whole system of our law.

Thus, in 2 Inst. 222, as to tolls, it is said, "What shall be deemed in law to be reasonable shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them."

So, in Co. Lit. 56, 57, Lord *Coke* says, "Reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs, and services upon the true state of the case depending before them: for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices."

In *Swinton v. Molloy*, 1 T. R. 537, an action of false imprisonment was brought by the plaintiff as purser of a man-of-war, against the defendant the captain. The defendant pleaded a justification for a supposed breach of duty. In evidence, it appeared that the defendant had imprisoned the plaintiff for three days without inquiring into the matter, and had then released him on hearing his defence. Lord *Mansfield* ruled as matter of law, that such conduct on the part of the defendant was not a proper discharge of his duty; therefore, that his justification under the discipline of the navy failed him. His lordship did not leave the matter to the jury.

And even in *Beckwith v. Philby*, 6 B. & C. 637, which may be relied on by the other side, the learned Judge first gave his opinion, that the arrest and detention were lawful, if the jury should be of opinion that the defendants had (i. e. upon the facts proved) reasonable cause of suspecting the

plaintiff of felony. He did not, as was done in this case, leave the whole matter to the jury.

But the case of *Beckwith v. Philby* cannot be reconciled with former authorities, unless it be understood that the Judge gave his opinion as to there having been reasonable and probable cause, in case the jury should find that the defendants acted *bonâ fide* upon such reasonable and probable cause.

Secondly, the Judge should have left to the jury the question, Whether the defendant had reason to suspect that the plaintiff would escape?

A constable ought not to arrest without a warrant, unless there be reason to suspect an escape, if he waits to procure a warrant. Here, the plaintiff was well known as a respectable resident in Cheltenham, and she ought not to have been taken from her bed at night, or forced to quit her house. The defendant knew he might find her in the morning. She was a female, and old, and there was no chance of her attempting to escape. If such a proceeding were allowable, the most respectable individuals, even judges themselves, might, upon the unfounded assertions of any unprincipled person, be dragged from their beds to a prison. But, even in the execution of his duty (and where the arrest is admitted to have been well founded), a constable can do nothing more than is necessary to prevent an escape. In *Wright v. Court*, 4 B. & C. 596, the Court held, that a constable could not justify handcuffing a prisoner, unless he has attempted to escape, or unless it be necessary, to prevent him from doing so.

According to the older authorities (4 Inst. 177), even a warrant could not be granted to search a house, on bare suspicion, before the stats. 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10; and *Samuel v. Payne*, Dougl. 359, is the first case which establishes that a constable may justify arresting a party without a warrant, upon a reasonable charge of felony. But still this can be done only in cases where escape is probable, 2 Hale, 91, 1 Hale, 567, 589; and where the constable himself knows of the felony.

In *Ledwith v. Catchpole*, Cald. 291, 23 G. 3, *Buller, J.*, says, "If the constable acts upon suspicion, must it not, to make it a justification, be a reasonable ground of suspicion in his own mind, and within his own knowledge, and not merely the information of others; for if it is not so, he takes upon himself to judge of the evidence of others, when he ought to go before a magistrate, who is the proper judge."

*Ledwith v. Catchpole* differed from *Samuel v. Payne*, in this respect, that no charge was made: but a felony had actually been committed; and two of the judges held, that, under the circumstances, the constable was justified. But the probability of escape, if the officer had not acted, seems to have been a ground of their decision. Lord *Mansfield* says, "Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if, under probable cause, an arrest could not be made; and felons are usually taken up on descriptions in advertisements." That is, not only probable cause of suspicion of the crime, but probable cause to fear an escape.

The point in *Samuel v. Payne* was raised on demurrer in a case in the Year-book, in Hilary term, 7 Hen. 4, 35 pl. 3: the Court inclined to the doctrine of *Samuel v. Payne*; but the case was adjourned. But it is material to observe, that the plea of justification stated circumstances in which an escape might probably have been apprehended. The plea was, "that certain persons came to the defendant, the bailiff, in London, and told him that the plaintiff and another were come into London with certain cattle which were stolen, as it seemed to them. Upon which he went to the plaintiff and the other person, and found the cattle en un obscur lieu, in a house, and upon that arrested them."



The parties being strangers in London, and the cattle in concealment, the probability of escape was great.

It would be of serious consequence to the liberty of the subject, and the peace and comfort of society, if a constable is to be empowered to arrest on his own suspicions and judgment, where he has no reason to fear escape, and may with propriety lay the case first before a magistrate.

A rule nisi having been granted,

*Ludlow*, Serjt., showed cause. The learned Judge's direction to the jury was in substance correct. By desiring the jury in effect to find, whether the constable acted on a belief of the representation made to him by Miss Hamerton, the learned Judge impliedly decided that that representation, if believed, formed a probable ground for the apprehension of the plaintiff.

The direction was in substance conformable to that in *Beckwith v. Philby*, a case in which the law on the subject was well considered. As to the alleged omission to leave to the consideration of the jury the question, whether or not the defendant had employed the precise measure of coercion necessary for his purpose, such a question might have arisen if the plaintiff had been loaded with fetters; but, short of apprehension, no precaution would have been adequate to ensure her forthcomingness, except the placing a guard round her house all night, a step totally unfitted to the occasion, and probably not in the constable's power.

*Russell*, in support of his rule, relied on the authorities before cited.

*Best*, C. J. This was an action for false imprisonment. The defendant, as a constable, gave in evidence, under the general issue, circumstances to show that, in the execution of his duty, he had a probable cause for apprehending and imprisoning the plaintiff. The jury having found a verdict in his favor, a new trial has been moved for, on the ground that the jury were misdirected; first, in the circumstance that they were left to consider whether the defendant had probable cause for arresting the plaintiff; and, secondly, in the circumstance that they were not requested to consider whether or not the defendant had resorted to a degree of coercion unnecessary for the occasion.

The question of probable cause is, no doubt, a question for the Judge; but the jury must first find the facts which are supposed to constitute the probable cause; and it is sometimes difficult to draw the line between the law and the fact. It has been argued in effect, that if the jury had intimated their belief of the facts, the plaintiff ought to have been nonsuited. But on these facts the Judge could not properly have directed a nonsuit. It was necessary to leave to the jury, whether, admitting the facts, the defendant acted honestly; for if he did not,—if he acted without giving credit to the statement made to him by Hamerton,—the verdict ought to have been against him, and with heavy damages. But the learned Judge tells them, "If you believe the facts, and thence infer that the defendant was acting honestly, you must find for him." This was saying in substance, that, in his opinion, the facts, if believed, furnished a probable cause for the defendant's conduct. But if the direction to the jury were, on the whole, substantially right, a mere inaccuracy of expression will not render it necessary to have recourse to a new trial. This direction was substantially right. It was for the jury to say whether they believed the facts; and, if they believed them, whether the defendant were acting honestly; in other words, whether the jury, under the same circumstances, would have done as he did. It has been further contended, that, without a warrant from a magistrate, a constable has no

right to apprehend upon suspicion, unless there be danger of escape if he forbear to apprehend. The law, however, is not so. For though a private individual cannot arrest upon bare suspicion, a constable may. This has been decided in so many cases, that it is unnecessary to refer to them; and unless the law were so, there would be no security for person or property. Then, had the constable in this case reason to suspect that a felony had been committed? Hamerton told him that the plaintiff had robbed her, and that her suspicions were confirmed by an anonymous letter which had fallen into her hands. The constable had no means of knowing that this letter had been written by Hamerton herself, and if he believed it genuine, it afforded ample ground for suspicion. That has all been left to the jury, and they have come to the same conclusion. A passage has been referred to in 4 Inst. 177, to show that a constable cannot arrest upon suspicion; but the words are, "bare surmise," which is a very different thing. "One or more justices of peace cannot make a warrant upon a *bare surmise* to break any man's house to search for a felon, or for stolen goods; for they, being created by act of parliament, have no such authority granted to them by any act of parliament; and it should be full of inconvenience that it should be in the power of any justice of peace, being a judge of record, upon a bare suggestion to break the house of any person, of what state, quality, or degree, soever, and at what time soever, either in the day or night, upon such surmises."

And the authority of *Hale*, even in the passage cited, is against the position contended for. "A constable may, ex officio, arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of peace." — "If a felony be committed, and A. acquaints him that B. did it, the constable may take him and imprison him, at least till he can bring him before some justice of peace. But if there be only an affray, and not in the view of the constable, it hath been held he cannot arrest him without a warrant from the justice; but it seems he may, to bring the offender before a justice, though not compellable."

Then, *Samuel v. Payne* is an express decision that a constable may justify an arrest upon reasonable suspicion.

It has further been insisted, that, at all events, an undue degree of coercion was resorted to; that the plaintiff ought not to have been apprehended at night, or compelled to go from her home. But what was the constable to do? Was he to go home? or to watch the plaintiff's house all night? Hamerton had required his assistance, and if the plaintiff had escaped, he would have been responsible. A person in his situation has little discretion left to him; if a charge be made, he must act; and the defendant would not have been justified if, after the information he had received, he had not gone that night to the plaintiff's house: he used no unnecessary violence; he did not break the door; and he was bound to make the arrest. The case has been ably argued, and is of great importance. It is important that constables should not abuse their authority, and equally so that they should not be discouraged in the due discharge of their duty. We cannot uphold the notion that a constable is not permitted to go into a house at night to apprehend a person suspected. Severity, indeed, is not necessary, and parties charged should be treated according to their condition; but it is necessary that the constable should have their persons secure. The sufferings of the plaintiff in this cause are indeed to be regretted; but they have been occasioned by the wicked

ness of Hamerton, of whom the defendant was the innocent instrument, and therefore the rule for a new trial must be discharged.

PARK, J. I do not impeach any of the cases that have been decided on this subject, nor had I ever a doubt that it is the province of the judge on such occasions to determine the point of law; but as that must be compounded of the facts, and as the jury must decide on them, my practice has been to say, "You are to tell me whether you believe the facts stated on the part of the defendant, and if you do, I am of opinion that they amount to a reasonable and probable cause for the step he has taken." I do not direct a nonsuit, because the fact is so closely connected with the law. The direction of the learned Judge in this case is conformable to that mode of proceeding, and is substantially the same as in *Hill v. Yates*, and *Beckwith v. Philby*. *Littledale, J.*, in that case directed the jury to find a verdict for the defendants, if they thought, upon the whole evidence, that the defendants had reasonable cause for suspecting the plaintiff of felony; and Lord *Tenterden* said, "Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury." — "There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authority." The direction of the learned Judge, in the present case, was tantamount to this: "If you think the defendant acted bona fide, I am of opinion he had probable cause for the course he pursued."

It has also been objected, that there was no necessity for apprehending the plaintiff at night, and a case has been put of the apprehension of a judge at his own house. But was the constable to stay in the street all night, after the information he had received; or in the plaintiff's room? No. And the very circumstance of the magistrate's committing the plaintiff the next day affords a presumption that the defendant was acting bona fide. The circumstance of a felony having been imputed to the plaintiff was a sufficient reason why the constable should apprehend an escape.

BURROUGH, J. A constable has always reason to apprehend an escape when he receives information of this nature; and if he did not act upon such supposition, there would be no safety for property in London. I am clearly of opinion that the defendant might have justified this conduct in a plea, stating that a felony had been committed, and that he had been informed of it. What Hamerton told him, added to the letter she produced, was sufficient to raise a strong suspicion in the mind of a constable; and such a justification could not have been got rid of but by denying the facts alleged. Here they were true, and if the constable had ground to believe them, that was sufficient for him. Nothing but the subsequent conviction of Hamerton has raised the difficulty in this case; but the question is, on what grounds and motives the constable acted at the time. He had reasonable ground to believe the charge, and it was his duty to apprehend the plaintiff; that being so, the learned Judge's direction was right in substance.

GASELEE, J. On a review of all that has been said, I do not alter the opinion I had formed at the trial. I said to the jury in substance what

has been stated; but I never meant to leave to them the question of legal probable cause; for I had the case of *Beckwith v. Philby* before me, and I was requested to nonsuit the plaintiff. I could not do so upon the plaintiff's case, though, in similar causes, I have occasionally done so, after hearing the defendant's case; but when there is any doubt as to the facts, they must be found by the jury. By leaving them to the jury in this case, and also whether the defendant acted bona fide, I intimated, in effect, that if they were satisfied on that head, the defendant stood excused.

As to the point about the probability of escape, none of the authorities cited go the length of saying that the constable cannot detain, except where he has reason to apprehend an escape. The rule, therefore, must be

Discharged.

### HUDSON v. REVETT. — p. 368.

1. The defendant executed a deed, conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demand were stated in the deed; a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the blank the next day, in the defendant's presence, and with his assent. He afterwards recognized the deed as valid in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed: Held, that the deed was valid, notwithstanding the filling up of the blank after execution.
  2. The attorney who had prepared the deed, on the retainer of the trustees, was held a competent witness in an issue directed by the Court, to try its validity, although one of the trusts was to defray the charges of preparing the deed, and although he was defendant in another action, his success in which depended on the validity of the deed.
- At all events, in such an issue, the defendant was held not entitled to a new trial, on account of the admission of the testimony of such witness, justice having been done.

THIS was an issue directed by the Court of Common Pleas, to try whether certain deeds of lease and release, and an accompanying deed of trust, were the deeds of the defendant, and if so, whether they had been obtained by fraud, covin, or misrepresentation.

The lease and release bore date the 25th and 26th of November, 1825, respectively; the deed of trust the latter day; and the object of the deeds was to effect a conveyance of Revett's property to Hudson, in trust to raise money by sale of it for the payment of Revett's debts, with a trust, as to any residue, in favor of Revett; and "in the first place, for the trustee to pay and defray the costs, charges, and expenses, of all parties thereto attending the preparing, settling, completing, and executing those presents, and the several indentures of lease and release therein referred to."

At the trial, before *Holroyd, J.*, last Suffolk Summer assizes, Mr. Brown, the attorney who prepared the deeds, and was also a party to the deed of trust, stated, that on Monday the 28th November, 1825, the defendant being then a prisoner in the King's Bench prison, he, Brown, on the part of the plaintiff and other creditors, and acting, as he conceived, for all parties, went, accompanied by Columbine, the attesting witness, to the defendant in the prison, for the purpose of procuring the execution of the deeds. That they corresponded exactly with drafts which had before been assented to and signed by the defendant; that blanks were left for the amounts of the debts of various creditors, which were then filled up, with the exception of the blank for the debt of one Mills, a creditor; that Mills, who was present, claimed 16,000*l.* odd; but that the

defendant showed an account, reducing Mills's debt to 14,858*l.* 8*s.* 8*d.*, and said he had vouchers by which he could confirm the account. The account was admitted, subject to the production of these vouchers; and it was agreed that the blank for Mills's debt should be filled up when they were produced. The defendant and Mills then executed the deed, leaving the blank to be filled up as above mentioned. This statement was confirmed by the attesting witness, the only other person present. The next day Brown and Mills attended the defendant again; but Columbine was not present. The defendant produced the vouchers in question; the balance was struck; Brown filled up the blanks with the sum of 14,858*l.* 8*s.* 8*d.*, and then went away, taking with him the deeds for the purpose of procuring their execution by other parties. The instrument at that time had a deed-stamp, (not ad valorem,) and no new stamp was added. The defendant left the prison shortly afterwards, and the deeds were executed in his presence by his wife, (who also joined in a fine to enure to the uses of the trust-deed,) under his sanction, when he was at liberty.

The plaintiff, the trustee, did not execute the trust-deed till the end of the ensuing December. Many letters were subsequently written by the defendant, in which he not only treated the deeds as valid instruments, but ordered the occupiers of the property to pay their rents to the plaintiff, and the steward of the manor to deliver up his books and the rolls of the manor to Brown. It appeared, further, that he had told one Chapman that he had executed the deeds, and had gained time; — also, that he had carried into effect the fine that was to pass his wife's interest.

Brown was objected to as a witness, as having an interest to support the deed in order to recover his own charges, and as being defendant in an action of trespass, in which his defence rested on a claim to property under this deed. See *Revett v. Brown*, ante, page 345. But it was answered, that though by an express clause in the deed the trustee was authorized to defray those charges out of the property, he was personally liable to Brown under his retainer; that Brown could recover against him only by virtue of that retainer, and that the deed would be no evidence in support of Brown's claim. The learned Judge overruled the objection.

No evidence was offered on the part of the defendant; but the following passage in Bull. N. P. p. 267, was relied on: "If there be blanks left in an obligation in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered—as if a bond were made to C. with a blank left after for his Christian name and for his addition, which is afterwards filled up."

*Holroyd, J.*, told the jury it did not appear in the passage cited that the alteration was made in the presence of the party, but that, if in such a case there was that which amounted to a redelivery, and showed that the party meant the deed should be acted on in its altered state, the alteration being made in his presence would amount to a redelivery, and the deed would be his in its altered state; he referred to *Goodright, d. Carter, v. Straphan*, Cowp. 201, where the redelivery by a feme, after baron's death, of a deed delivered by her whilst covert, was held a sufficient confirmation of the deed to bind her without reexecution or re-attestation, — and said, that circumstances alone might be equivalent to a redelivery. Then, observing on the fact that the blank in the present case had, according to a previous arrangement, been filled up in the defendant's presence, and

with his consent, that he had afterwards assisted at and sanctioned the execution of the deed by his wife, and had acted upon it as a valid instrument, he said, that unless the jury disbelieved the evidence, there was abundant ground for their considering this deed as the deed of the defendant: — of fraud or covin no evidence had been offered.

The jury found that the deeds were the deeds of the defendant, and that the execution of them had not been obtained by any fraud, covin, or misrepresentation.

*Wilde, Serjt.*, moved for a new trial, on the ground that Brown ought not to have been admitted as a witness, and that the deed was void, having been altered in a material particular after its execution, without any redelivery. There was also an objection to the stamp.

A redelivery, he contended, could only be implied where there was no evidence to rebut the presumption; here, the circumstance that the deed was always out of Revett's possession, was evidence sufficient to rebut any such presumption. In *Goodright v. Straphan* the deed had never been executed at all before the death of the husband, for an execution by a feme covert was altogether void: here the deed was once well executed, and there could be no new execution, actual or implied, without a new stamp. A rule nisi having been granted,

*Storks and Russell, Serjts.*, showed cause. If Revett was present when the blanks were filled up, the validity of the deed is unimpeachable. But even if he were not, the transaction may be upheld if the insertions were made with his assent, and in conformity with the original intention and agreement of the parties.

It was settled between the parties that the deed should be executed, subject to the blanks being filled up, when the amount of debt should have been ascertained and agreed upon. They were filled up, therefore, according to the intention of the parties, and there was no alteration of the deed, but a completion of it, according to the intentions of the parties.

Under these circumstances it may be contended, first, that the deed remained the deed of the parties (without redelivery) notwithstanding the insertion.

The only authority cited to the contrary is Bull. N. P. 267. "If there be blanks left in an obligation in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered. As, if a bond were made to C., with a blank left after for his Christian name and for his addition, which is afterwards filled up." And in support of this position the learned writer cites 2 Roll. Ab. 29 (Faits; Interliner); but the passage there is, "Si un fait soit alter en point material per le plaintiff mesme ou per ascun estranger sans le privitee del obligée; soit ceo interlineation, addition, rasure, ou per le traction d'un penn per le middest d'ascun parol, le fait per ceo devient void. Co. 11. *Pigot's* case, 27, per curiam resolve; car ceo ore n'est mesme fait. Come si un obligation soit fait al un viscount pur apparer, &c. et en l'obligation le nosme del viscount est omyt, et puis le delivrie de ceo son nosme est interline, ou per l'obligée ou per un estranger sans son privitie, encore le fait est void per ceo." So that *Pigot's* case is the fountain; and that case does not support the dictum of *Buller, J.*, as to the addition; on the contrary, a special verdict found that the bond was made by *Pigot* the defendant, and two others, who were held and firmly bound to the plaintiff, *Benedict Winchcombe, Esq.*, in sixty pounds; that the plaintiff was sheriff of the county of Oxford, and the condition was for the appearance of one of the parties in the King's Bench to answer in a plea of trespass; that the bond was delivered by *Pigot* as his deed to the use of the plaintiff, and that after

the delivery of the deed, the words "Sheriff of the county of Oxford" were interlined after the words Benedict Winchcombe, Esq., and before the words sixty pounds; sine notitia, Anglicè, the privy or command of the said Benedict. The Court decided, on the ground that this was an addition by a stranger, without the privy of the obligee, on a point not material in anything that appeared to the Court; and judgment was given for the plaintiff. Neither does that case meet the point of the insertion of that which has previously, and at the time of the execution of the deed, been agreed to be inserted. But in *Markham v. Gonaston*, Cro. Eliz. 627, even such previous agreement was held, according to the ultimate decision of the case, not essential to the validity of the deed. Markham, at the request of Sir Francis Willoughby, was bound in a statute with Sir F. Willoughby to W. Tracy, Esq., as his surety; and upon this, Sir F. Willoughby caused Gonaston, his servant, to make a counter bond, in which Sir F. Willoughby and one Geoffrey Fox were bound to Markham, to save him harmless from the same statute; and Sir F. Willoughby commanded his servant to leave out of the condition of it the Christian name of W. Tracy, the place of his habitation, the county, and his addition. The servant did so accordingly, and then G. Fox sealed and delivered the counter bond as his deed, to the use of Markham. Afterwards, the servant Gonaston, by the command of his master, Sir F. Willoughby, and by the assent of G. Fox, inserted in the blanks the Christian name of W. Tracy, the place of his habitation, the county, and his addition, and then Sir F. Willoughby sealed and delivered the obligation. An action of debt was brought upon this bond, in the Common Pleas, against G. Fox, who pleaded the filling up these blanks after the bond was sealed and delivered, and so, not his deed. Issue was taken on the filling up, &c., and upon proof that they were so filled up, the plaintiff Markham was nonsuited. Then Markham brought an action on the case against Gonaston, in the nature of deceit, for destroying the effect of the bond. The defendant pleaded the special circumstances of the filling up by order of his master, to which the plaintiff demurred, and it was adjudged for the plaintiff. The Court held that the condition was altered by the words inserted, "for whereas before it did not appear to which of the Tracys the recognizance was entered, it is now made certain; and it may be, that it was now to another man than in truth it was." But *Popham* made this observation, viz., "That if it had been appointed by the obligor (viz. G. Fox) before the ensealing and delivery thereof, that it should be afterwards filled up, it might then, peradventure, have been good enough, and it should not have made the deed void." And it was afterwards adjudged good in the Court of King's Bench, *Markham v. Gonaston*, Moore, 547, where, after giving a short report of the case according with Cro. Eliz. the reporter says, *mes nota*, that afterwards the plaintiff brought a new action on the bond against Fox, who pleaded the special matter, and concluded that therefore it was not his deed, to which Markham replied, that the blanks were filled up with the assent of Sir Francis and Fox; to which Fox demurred, and it was adjudged for the plaintiff. So in *Paget v. Paget*, 2 Chan. Rep. 410, cited in Vin. Abr. Faits (U), "a deed of revocation and a new settlement made by that deed, though after the sealing and execution thereof blanks were filled up, and not read again to the party, nor resealed and executed, was yet held a good deed." The decision in Moore is recognised in *Zouch v. Clay*, 2 Lev. 35. That was an action of debt on bond. A. and B. delivered the bond to C., and after, by consent of all parties, the name and addition of D. was interlined, and he also sealed the obligation and delivered it. And if the obligation by this alteration were made void against A. and B., or not, was the question. But by *Hale* and the whole Court it was adjudged that it was not, and that it is the obliga-

tion of all three, and so is Moore, although in Cro. it was before adjudged contrary. *Texira v. Evans*, 1 Anstr. 228 (mentioned by *Wilson, J.*, in the argument upon *Master v. Miller* in error from the King's Bench), is strong in point. The bond had been executed in blank, and the plaintiff had advanced money on it to a broker, after which the names and sums had been inserted in the blanks by the broker. The defendant pleaded *non est factum*; and Lord *Mansfield* ruled that the bond was well executed, and that the broker was to be considered as the attorney authorised by the defendant to fill up the blanks, and the plaintiff had a verdict. The case of *Doe d. Lewis v. Bingham*, 4 B. & A. 672, shows clearly that a deed requiring to be executed by different parties may be considered as one entire transaction, operating as to the different parties to it, from the time of the execution by each, but not perfect till the execution of it by all the conveying parties; and if so as to parties, why not as to sums agreed to be inserted? In *Matson v. Booth*, 5 M. & S. 223, it was decided as to a bail bond, that the addition of another obligor after the bond had been executed by four others, but had not been accepted by the sheriff, did not vacate the bond, or make a new stamp necessary. That case established two important points; first, that such an instrument until completed is considered as *in fieri*, and in the nature of an escrow only:—and a deed may be in the nature of an escrow only, from circumstances and the nature of the transaction, without the formal and apt words spoken of in *Shepherd's Touchstone*, 50 and 60: therefore, where a deed is to be executed by several parties, and if any of them refuse, the deed will be inoperative, a party who executes first must be taken to execute and deliver it as his deed conditionally in case the others also execute: so if the insertion of a sum be necessary to give the instrument effect, a party who executes before such sum has been ascertained must be understood as executing conditionally, and to give the deed effect upon such sum being ascertained and inserted: until insertion, it is therefore an escrow; upon insertion, and not till then, it becomes the deed of the party who executed, by relation to the time of the execution:—secondly, that the concurrence of the agent of the obligors was of equal force with the concurrence of the obligors themselves. And this will apply to the objection of the insertion of the sum not having been made in the presence of *Revett* (if that were so) because *Brown* was authorised to make the insertion. *Bayley, J.*, says, "The addition was made with the concurrence of the agent of the obligors, at a time when the bond could be considered no otherwise than as in the nature of an escrow; and being made with the concurrence of the agent of the obligors, it is the same as if it had been with their concurrence, which brings the case within the authority of *Zouch v. Clay*."

The deed in question therefore is good, and the deed of *Revett*, without any re-execution or redelivery.

But if not good without a redelivery, it would be clearly so if such redelivery, or what was tantamount to it, took place.

The effect of a re-execution is shown in the case of *Coke and Another, Executors, v. Brummell*, 2 B. Moore, 495. *E. H. Delmè* (who afterwards took the name of *Radcliffe*) as surety for *Brummell*, executed a joint bond and warrant of attorney to secure an annuity to one *Crick*. After the execution by *Radcliffe* and *Brummell* it was discovered that part of *Radcliffe's* Christian name (*viz.*, *Henry*) had been omitted in the body of those instruments, and he re-executed them after such name had been inserted, without the knowledge of *Brummell*.

In an action brought against *Radcliffe*, in the Court of King's Bench, on the bond, he pleaded a judgment recovered against himself and *Brummell*. And afterwards the Court of Common Pleas refused to set aside, on his applica-



tion, a joint judgment entered against them on the warrant of attorney, inasmuch as the instrument was not defeated by such insertion of Radcliffe's Christian name, and as he had recognised the validity of the judgment in the action brought against him on the bond. *Gibbs, C. J.*, in delivering the judgment of the Court, says, "This warrant of attorney was given as a collateral security to an annuity bond in which the defendant Brummell was the principal, and Radcliffe, who now makes this application, his surety. At the time the bond and warrant of attorney were executed, the grantee was not aware that Radcliffe was called Henry as well as Emilius, and he did not discover it until he saw his signature at the foot of those instruments. He was then fearful that the warrant of attorney might prove defective, and, therefore, procured Radcliffe to re-execute it, having previously caused an alteration to be made throughout the body of it, by interlining and inserting the word Henry between Emilius and Delme. In point of fact, the warrant of attorney was perfect without this alteration; but there can be no doubt but that judgment may now be entered upon it, Radcliffe himself not only having consented to such alteration but having re-executed the instrument. Besides, in an action on the bond brought against him in the Court of King's Bench, he pleaded a judgment recovered by the testator against himself and Brummell, thereby not only recognising the validity of the judgment, but, by making use of it, defeating that action; and after that he makes this application, whereby he seeks to set it aside. Under these circumstances, the Court are of opinion that they cannot do this; first, because the nature of the securities was not defeated by the insertion of the word Henry, to which alteration Radcliffe himself was a party; and, secondly, because he afterwards recognised the judgment as being legally entered up, and availed himself of it in the action brought in the Court of King's Bench."

It is clear, however, that a re-execution is not necessary. Where the first delivery, from any circumstances, requires confirmation, a second delivery will suffice. If the first delivery is considered (from the blanks and circumstances of a future insertion then agreed upon) to have been imperfect, and to require something further to be done, then a second delivery, or that which is tantamount, will supply the defect. And the Court will not consider the first delivery as a complete delivery, if the effect of so considering it would be to avoid the deed. *Perkins, s. 154*, says, "It is to be known that a deed cannot have and take effect at every delivery as a deed; for, if the first delivery take effect, the second delivery is void." A second delivery may, therefore, in some cases, be merely an execution and confirmation of the first, *ut res magis valeat quam pereat*.

In *Butler and Baker's* case, 3 Rep. 35 b (a case which was argued twenty-one times severally) the case of *Jennings v. Brugge* (37 Eliz.) is given at the end: there, amongst other resolutions, is the following:—"It was resolved, that to some intent the second delivery hath relation to the first delivery, and to some not, and yet, in truth, the second delivery hath all its force by the first delivery, and the second is but an execution and confirmation of the first; and, therefore, in case of necessity, *et ut res magis valeat quam pereat*, it shall have relation, by fiction, to be his deed ab initio by force of the first delivery."

Then, has there been a second delivery in this case?

*Goodright dem. Carter v. Straphan* establishes this point, viz., that circumstances alone may be equivalent to a redelivery. Lord Mansfield, after citing two cases from the year-books, which confirm the proposition, that it is not necessary for a deed to be re-executed or reattested, but redelivered only, says, "Now, delivery is an act in pais only. The question, then, is,

Whether the law has laid down any precise form in which delivery must be made, or whether circumstances may not be equivalent to it without actual delivery? Lord *Coke*, in his commentary on Lit. s. 36, says, As a deed may be delivered to the party without words, so a deed may be delivered by words without any act of delivery; as if the writing sealed lies upon the table, and the feoffor or obligor says to the feoffee or obligee, 'Take up the said writing: it is sufficient for you,' or 'It will serve your turn: it is a sufficient delivery.' 2 Roll. Abr. 26, pl. 2, and *Goodright v. Gregory*, Lloft, 339, is to the same effect. No manual tradition or handing over of the deed to the grantees is necessary. In *Doe dem. Garnons v. Knight*, 5 B. & C. 671, the Court of King's Bench held, that though the grantor kept the deed in his own possession, it was a valid and effectual deed, and that delivery to the party who was to take by the deed, or to any person for his use, was not necessary. In the present case, after a redelivery, Revett sent the deed to his wife, and was present when she executed it. The fine, too, being levied in pursuance of a prior covenant, shows still more distinctly that the whole must be taken as one entire transaction, and operate as one assurance. This principle is established in *Doe dem. Odienne v. Whitehead*, 2 Burr. 704, where it was held, that if a fine be levied in pursuance of a covenant in a prior conveyance of an estate tail, as where tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly, the lease and release and fine will be considered as one assurance, and will operate (by means of the fine) to discontinue the estate tail. And if it will thus be considered when it acts to the destruction of an estate, a fortiori should it be so when it goes to preserve and support a conveyance according to the intention of the parties.

The Court relieved the learned Serjeants from arguing the point about the stamp, or the admissibility of Brown's testimony.

*Wilde*. First, the question touching the re-execution of the deed ought not to have been left to the jury under the circumstances of this case, which is pregnant with suspicion. The party sought to be charged was a prisoner; no separate professional adviser was present on his part; blanks were left in the deed for a heavy sum; his whole property was conveyed away, and the attesting witness was not present at the supposed re-execution. It would be of most dangerous consequence, and would render the solemn execution of deeds a useless ceremony, if a re-execution could be presumed after the original instrument had been so materially altered. But the deed was perfect when it was first executed, and, therefore, a re-execution, which implies that the deed is previously imperfect, could not have any operation. It was signed, sealed, and delivered: the estate had passed out of the relessor, and had vested in the relessee, and the attestation was such as to show the deed to be a perfect instrument. According to Perkins, s. 154 (a passage cited by Lord *Mansfield*), "If the first delivery take any effect, the second delivery is void." As to the instrument's operating as an escrow till the blanks were filled up, Com. Dig. Fait (A. 3), Shep. Touch. 58, and 4 Cruise, 36, are express authorities to show, that if a deed be delivered as an escrow, it must be so delivered in terms, and the fact must be noticed in the attestation. If the re-execution gave effect, from what time was such effect to commence? from the first or the second delivery? and if from the second, would the deed under its general words convey property accruing in the intermediate time? or would property, disposed of subsequently to the first delivery, be excluded from the operation of the deed? But even admitting a second delivery, the deed ought to have had a second stamp, and at all events was avoided by the alterations then made in it; for

Secondly, the rule of law is clear and undisputed, that any alteration of a

deed in a material point by insertions, erasures, or otherwise, will avoid the deed, even though the alteration may have been innocently or laudably intended; and the application of this rule in particular cases ought not to govern the decision of the Court; the applications of the rule may have been correct or incorrect; the rule itself cannot be misunderstood, and has never varied.

But the result of all the cases, from *Zouch v. Clay* to *Doe v. Bingham*, is, that if by the alteration in the deed the contract be altered, the deed is void. And *Markham v. Gonaston* is referred to by *Buller, J.*, for the purpose of establishing that principle, and not to indicate his approbation of the particular decision. But that was a case on a bail bond, and the liability of the party charged could not be changed by the interlineation. The note of *Page v. Page* is so short, that it does not appear what was the nature of the alteration, but the case, as stated, cannot be law. *Coke v. Brummell* was an application to the equitable jurisdiction of the Court upon a warrant of attorney, which entitled the Court under the annuity act to decide according to the good conscience of the case. So that the question still is, "Has the contract been varied?" Here the contract was essentially varied by the insertion of the sum alleged to be due to Mills. Before that insertion, the contract was generally to pay the defendant's creditors the debts due from him. Under such a contract it was still open to him to dispute and to ascertain correctly the amount of those debts; but by the insertion of a specific sum as due to Mills, he was engaged to pay that sum to Mills whether justly due or not. If the trust deed be void, it is clear, that as the others all constitute one conveyance, the grantees will stand seised for the benefit of the grantor. Lord *Cromwell's* case, 2 Rep. 69.

Thirdly, there ought to have been an *ad valorem* stamp, and not a common deed stamp, as the conveyance by lease and release, if not a mortgage, was at all events a conveyance to effect the absolute sale of the property. The trust deed being void, is out of the question, and then the conveyance by lease and release is not within the scope of the exception in the stamp acts in favour of deeds made for the benefit of creditors generally. 55 G. 3, c. 184, sched. part. 1, tit. Mortgage.

Lastly, Brown's interest rendered him incompetent as a witness; for not only were his expenses to be paid by virtue of the deed on which the cause depended, but his right to retain a verdict in an action pending against himself depended altogether upon the validity of the deed in question. A more direct interest in the event of the cause could not be created.

BEST, C. J. This was an issue which the Court thought it right to direct, for the purpose of ascertaining whether these deeds had been properly executed, or were obtained by fraud. The jury have found that all the deeds were properly executed, and they have negatived the fraud. An application has been since made to grant a new trial on several grounds. First, that a witness was admitted who ought not to have been received. Secondly, an objection has been taken to the stamp; that the lease and release ought to have had an *ad valorem* stamp, and not a mere stamp upon a deed conveying property to be sold for the benefit of creditors. The third objection is, that the trust deed was a complete deed at the time the witness attested its execution in the King's Bench prison, and that the learned Judge ought not to have left it to the jury to presume another delivery; that if it was a perfectly executed deed, the alterations made subsequently to its execution, though with the assent of all the parties, render that deed a nullity; and that if the trust deed be a nullity, all the other deeds are useless, because they refer to this, and cannot stand as a complete conveyance without it.

I am disposed to agree, though it is not necessary to decide that point, that if the trust deed is to fall, all the deeds will fall. But I am of opinion that all the deeds must stand. And that will dispose of the objection to the stamp act, because it is admitted, that if the trust deed is to be incorporated in the assurance, it shows the intent of the parties was to convey for the benefit of creditors more than five, and comes within the exception of the stamp act. As to the admissibility of the witness, I do not think it necessary to decide that Brown could not in a court of law be considered as a competent witness, when the learned Judge, for whose opinion I entertain the highest respect, thought it right to receive him. But let us take it he was not; ought we in this case, who have sent this issue for the purpose of ascertaining facts which are to satisfy our minds, when we see that justice will be done, and has been done, whether that witness spoke the truth or not, — ought we to send this cause down again? It is not like the trial of an action, where a party perhaps has a right, if a witness deposes to facts that are material, and he is not a competent witness, to call on the Court and say, 'I am entitled to have that verdict set aside, for it was found on evidence which ought not to have been given.' That is not our situation with respect to this cause, because this is the creature of our discretion. and, therefore, we are now to decide whether, under all the circumstances, it would be fit to send it down again. Now, when we recollect that Chapman proved all that was necessary to be proved to sustain this verdict; that Chapman is uncontradicted; — I allude to the conversation with the defendant, when he acknowledged that he had executed the deed, and that these sums were engrafted into it; — when we recollect that the defendant after this wrote letters to the different tenants, and in those letters acknowledged the execution of the deed; can we say it is fit, in such a case, merely because some evidence was received which ought not to have been received, to send this question again to the consideration of a jury?

This brings us, therefore, to the great questions in this case. They have been divided into two. It has been first insisted that there was no perfect execution of the deed until the sum of 14,858*l.* was written in it; and if there was not a perfect execution of the deed up to that time, then it was competent for my brother *Holroyd* to refer it to the jury, to consider whether they would not presume an execution of the deed after all the sums were written in, and it was rendered a perfect deed. I am of opinion that this is a correct view of the case; and if it is, it comes precisely within the principle of the case to which my brother *Holroyd* has referred, of *Doe, d. Carter, v. Straphan*. In that case a deed had been executed by a married woman, and, as such, was undoubtedly void. After the death of her husband, she, by various acts, confirmed this deed. The Court of King's Bench decided, that by the confirmation of the deed the jury were warranted in presuming a reexecution of it. Undoubtedly, in that case, Lord *Mansfield* refers to a passage in Perkins, where he says, "It is to be known that a deed cannot have and take effect at every delivery as a deed; for if the first delivery takes effect, the second delivery is void; and in case an infant, or a man in prison, makes a deed and delivers the same as his deed, and afterwards, when the infant comes to his full age, or the man in prison, when at large, delivers the same again as his deed, which he delivered before as his deed, this second delivery is void." That brings us to the question, Was there any perfect delivery of this deed

antecedent to the period when these sums were written in? If one looks at the deed, and particularly at that part of the deed which my learned brother has referred us to, it is quite impossible that the deed could be considered as having any operation till these sums were actually written in, because, what was the object of the deed? The object of all the deed was to convey the estates to trustees, that those estates might be sold, and that the proceeds of those estates might be applied to pay certain creditors' debts, which were to be ascertained. In the preparation of the draft of this deed, blanks were left for the insertion of the sums when those sums should be ascertained. When these parties met in the King's Bench prison, can it be said that that was a perfect execution of the deeds, when the sums that were due to these creditors remained unascertained? The operative part of the deed refers to the payment of particular sums, which, as then, were unascertained. It is quite clear, if nothing had passed at this time, that the deed could not be an operative deed until those sums were introduced, because the great object of the deed was the payment of those sums. I think, therefore, taking it in this point of view, that this was not to be considered as an execution of the deed, — that this was not a complete deed, — and that therefore the case falls within the authority of the case in Cowper, and not within the law which is extracted from Perkins.

This deed, as I have stated, undoubtedly was not to be considered as complete until the sums were introduced. But it has been said, if it was delivered to the party, it could not be delivered as an escrow, unless so delivered, in terms. Perhaps, technically speaking, this is so; because a deed delivered to a party is not an escrow: a deed delivered to a stranger is an escrow till something is done: but though it is delivered to a party, there are cases, and in the same page, to which my learned brother referred, to show that it is not a perfect and complete deed; *Com Dig. tit. Faits (A 3):* "So if it be once delivered as his deed, it is sufficient, though he afterwards explained his intent otherwise, as if an obligation be made to A. and delivered to A. himself as an escrow, to be his deed on the performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant." The authorities referred to in the text, in support of this position, are at least conflicting; but in the next division (A 4) it appears that this position about delivery as an escrow is merely a technical subtilty; for the learned writer says, "If it be delivered to the party as an escrow, to be his deed on the performance of a condition, it is not his deed till the condition is performed, though the party happens to have it before the condition is performed." This he lays down on his own authority, without referring to any case; and I am warranted in saying we cannot have a better authority than that learned writer.

Let us see how that doctrine applies to the present case. The parties meet; something is to be done before a complete deed can be made; the sums are to be ascertained which the different creditors are to be paid. That cannot be ascertained that day; it is ascertained at a subsequent day, and they are written in. Take it, if you please, that this is a delivery of the deed as a deed; is it not a delivery of the deed in the language of Lord Coke, upon condition; that is, upon condition that something is to be done, which at that time was not done? That something is afterwards done: then, and not till then, it becomes a perfect deed. It seems to me, therefore, without touching any of the cases that have been decided on the operation of deeds, we may say that this deed was

not a complete deed, executed so as to have effect in the hands of the parties until these sums were written in.

I shall not, after what I have said, travel through the different cases that have been cited with respect to the alteration of deeds; but I beg not to be taken as deciding, that if a deed be altered with the consent of all the parties, after it is executed, it is not to be considered as a good deed. I think, if we were driven to examine that question, it would be found that, in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will, in its altered shape, be a good deed; but I do not decide this case on that ground. I decide it on this, that it either was no deed at all, until the sums were written in, and that then the jury were warranted in presuming a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in, which were to give it all its effect. I think we must take it, from what passed at the time of the execution, it was not to be considered as having effect, till it could have its full effect, by all the sums being written in, that were to be written in. On these grounds I am of opinion that the rule should be discharged.

My brother *Burrough*, (a) who heard the argument, desired I should state he concurred in this opinion.

GASELEE, J. This case has been extremely well argued, and a great many authorities have been referred to, which it is not necessary to go through at length. The authority that struck me the most, as against the opinion of my Lord Chief Justice, as now delivered, was the passage cited from Buller: — “If there be blanks left in an obligation in places material, and filled up afterwards by the assent of the parties, yet is the obligation void, for it is not the same contract that was sealed and delivered.” That is certainly borne out by the authority in Roll’s Abr. But I think the instance which he specifies is not borne out by the authority to which he refers. He goes on: — “as if a bond be made to C., with a blank left for his Christian name, and for his addition, which is afterwards filled up.” I should certainly have thought that the leaving the blank for the Christian name and the addition, imported of itself it was to be afterwards filled up; and I think that Mr. Justice Buller’s position is not warranted by the authority to which he refers. Certainly this case does not range itself within the first part of this sentence, because, notwithstanding the degree of industry with which my brother *Wilde* has cited cases, and the confidence with which he argued that the contract was altered, I cannot agree with him on that; it appears to me, from what was done in this case, that the contract was not altered. What was the object of the contract? The contract was to pay all that Revett was indebted to Mills, and other creditors; that which was uncertain when the deed was first executed, or rather when the deed was originally sealed, was afterwards reduced to a certainty. And the way in which I consider that this deed is good, is this, — that it was an imperfect execution, with an agreement at the time that it should take effect when the blanks were filled up. There was a meeting for that purpose, the sums at that time were agreed to, and it was filled up by Brown, who was adopted as the agent of both parties; and he took away the deed for the purpose of carrying it to other parties, by whom it was also to be executed. It is said that the defendant Revett never had himself the possession of this deed. No; but a deed may be delivered either by taking hold of the deed itself, or by words, or by acts.

(a) He was at chambers. *Park*, J., was absent, from ill health.

The permitting this person to take the deed away for the purpose of the other parties' executing it, is of itself fit to be left to the jury, as a question whether or not that was not (if a redelivery should be held to be necessary) a redelivery on the mere insertion of the sums. On that ground I am of opinion this trust deed is to be considered as good.

With respect to the witness Brown, I should have great difficulty on the subject, taking it in the usual course, in saying that Brown would be a witness. He is a party to the deed, and he had, at the time of the trial, incurred expenses, and the expenses were to be paid according to the terms of the deed. But, considering it in the point of view in which my Lord Chief Justice has considered it, and in which I have known issues, directed by the Court of Chancery, treated, where the object was to satisfy the conscience of the Court; if, upon the whole, we see that justice has been done, there is no occasion to send it down to a new trial. Now, has justice been done here? and does it depend really and singly on the testimony of Brown? First of all, What is the probability? The probability of the case is, that it was left for future consideration. There are a great many blanks when the deed is carried to be executed the first day in the King's Bench; all the blanks are filled up, except Mills's debt; the probability is that, at that time, Mills's debt was not ascertained; we have it from Brown it was done the next day. Does it rest on his evidence only? Mr. Chapman says, "I saw Revett afterwards, with the draft of the deed before him; he was reading; he told me he had executed it, and that he had got time:" therefore the evidence of Chapman shows that what was done the second day of meeting was done with Revett's assent. But it does not rest there; it appears that Revett was cognizant of all he had done, and he expressly acts upon and confirms the deed; for he says, in a letter to Moss, a tenant, "Having this day executed to Mr. Thomas Hudson, of the firm of Messrs. Harveys and Hudsons, bankers at Norwich, a conveyance of all my estate and hereditaments, in trust, for the purpose of satisfying various charges and encumbrances on the above property, I write to desire that you will in future pay your rents to the said Thomas Hudson, or his appointed receiver, whose receipt will be a sufficient discharge." That letter, therefore, shows the confirmation of the contract; it shows he was aware of what had been done, and I think satisfies the Court that the jury, upon this occasion, have done justice.

Rule discharged.

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Sir W. DE CRESPIGNY v. WELLESLEY. — p. 392.

In an action for a libel, it is no plea that the defendant had the libellous statement from another, and upon publication disclosed the author's name.

To the ninth count of a declaration for libel, the defendant, after pleading the general issue, pleaded, secondly, As to the publishing, and causing and procuring to be published, the following parts of the said supposed libel of and concerning the said plaintiff, in the said ninth count of the said declaration mentioned, with the intent and meaning therein mentioned; to wit, "Mr. De Crespigny told Mr. Wellesley he was wrong in supposing he had spoken to his father, Sir W. De Crespigny, (meaning the said plaintiff:) he had written a letter to him, and he had his (meaning the said plaintiff's) answer, in which he admitted the fact; and that his wife, Mrs. De Cres-

pigny, and himself had the letter; that all of the family knew of the circumstance, (intimacy,) that his poor brother William, who is dead, was extremely jealous of his father, (meaning the said plaintiff,) and had been turned out of his house; that his mother had told him that a child had been born, and that it had been her conclusion that his brother Herbert had spoken to his father (meaning to the said plaintiff) upon the subject, who replied that he (meaning the said plaintiff) entreated that so distressing a subject might not be again mentioned to him, (meaning to the said plaintiff;) the Rev. Mr. De Crespigny told Mr. Wellesley he thought he was quite right not to allow his children to remain with people so infamously connected. Mr. De Crespigny informed Mr. Wellesley he had seen the Miss Longs yesterday, at their house in Berkshire, and that he had directly accused Miss Emma Long with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then stated to Miss Dora Long, that Miss Emma Long had intrigued with his father, (meaning with the said plaintiff,) and that Mr. Wellesley (meaning the said defendant) intended to publish the whole story, unless they immediately gave up his children: Miss Long replied, that she had nothing to do with her sister's intrigue, and she must be responsible for her own conduct; but that no one would believe what Mr. Wellesley said: Mr. De Crespigny assured Mr. Wellesley that she never denied her sister's having committed the fault: Mr. De Crespigny told her his father had confessed it, (not denied it;) to which she made no reply, but put herself into a violent passion, and said she did not wish to see any of Mr. Wellesley's friends within her house; — notwithstanding such declaration, she invited Mr. De Crespigny to dine with them, and to sleep at Binfield House; the above minutes were shown to Capt. De Brooke, and on the part of the Rev. H. C. De Crespigny he admitted them twice to be correct, with the exception of one word, viz., that for *confessed it*, the words *not denied it* ought to be substituted;” the said defendant, by leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he says, that before the publishing of the said parts of the said supposed libel in the said ninth count of the said declaration mentioned, to wit, on the 5th day of December, in the year of our Lord 1827, at, &c., the said Rev. H. C. De Crespigny told the said defendant that he was wrong in supposing that he, the said H. C. De Crespigny, had spoken to his father, Sir W. De Crespigny: he had written a letter to him, and that he had his (meaning the said plaintiff's) answer, in which he (meaning the said plaintiff) admitted the fact; and that his (the said H. C. De Crespigny's) wife and himself had the letter; that all the family knew of the intimacy; that his poor brother William, who was dead, was extremely jealous of his father, (meaning the said plaintiff,) and had been turned out of his house; that his brother Herbert had spoken to his father (meaning the said plaintiff) upon the subject, who had replied, that he (meaning the said plaintiff) entreated that so distressing a subject might not be again mentioned to him, (meaning to the said plaintiff;) and the said H. C. De Crespigny then and there further told the said defendant, he thought he was quite right not to allow his children to remain with people so infamously connected: And the said H. C. De Crespigny, afterwards, and before pub-



lishing the said libel in the introductory part of this plea mentioned, to wit, on, &c., at, &c., further told the said defendant that he had seen the Misses Long yesterday at their house in Berkshire, and that he, the said H. C. De Crespigny, had directly accused Miss Emma Long with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then stated to Miss Dora Long, that Miss Emma Long had intrigued with his father, (meaning the said plaintiff,) and that Mr. Wellesley (meaning the said defendant) intended to publish the whole story unless they immediately gave up his children. That Miss Long replied, she had nothing to do with her sister's intrigue, and that she must be responsible for her own conduct, but that no one would believe what Mr. Wellesley said; and the said H. C. De Crespigny assured the said defendant that she never denied her sister's having committed the fault. Mr. De Crespigny told her his father had not denied it: to which she made no reply, and said she did not wish to see any of Mr. Wellesley's friends within her house: notwithstanding such declaration, she invited Mr. De Crespigny to dine with them, and to sleep at Binfield House. And the said defendant further said, that before the publishing the said parts of the said supposed libel in the introductory part of this plea mentioned, to wit, on, &c., at, &c., certain minutes and statements in writing were made as and for correct minutes and statements of the said communications and representations so made by the said H. C. De Crespigny as aforesaid, and the same were then and there revised and corrected by the said H. C. De Crespigny; and when so revised and corrected, contained, and still do contain, the words and matter following, with the interlineations and alterations as follows: (here followed a statement of the minutes as revised and corrected by the Rev. H. C. De Crespigny. The expression *not denied* was substituted for *confessed*; and the statement that his mother told him a child had been born, was erased; in other respects the minutes corresponded with the foregoing statement.)

And the said defendant further said, that afterwards, and before the publishing of the said parts of the said supposed libel, in the said ninth count mentioned, to wit, on, &c., at, &c., the said H. C. De Crespigny caused the said minutes and statements, so revised and corrected by him as aforesaid, and containing the words and matter last aforesaid, to be delivered to him, the said defendant, as and for a true and correct statement of the conversation he, the said H. C. De Crespigny, had had with the said defendant as aforesaid; and the said minutes were theretofore, to wit, on, &c., at, &c., shown to the said Captain De Brooke, in the presence of the said Colonel Freemantle, Mr. Saville Lumley, M. P., and Colonel Pater-son. And the said defendant further said, that at the time of the publishing the said parts of the said supposed libel in the said ninth count and in the introductory part of this plea mentioned, as therein mentioned, he, the said defendant, also published that the same had been so published to him by the said H. C. De Crespigny, therein mentioned as aforesaid; wherefore he, the said defendant, at the said several times when, &c., in the said ninth count mentioned, did publish of and concerning the said plaintiff the said several parts of the said supposed libel in that count mentioned, as he lawfully might for the cause aforesaid, and this he is ready to verify, &c.

To this plea there was a demurrer; and many causes of demurrer were specified and argued; but as the decision turned altogether on the general question, it is unnecessary to state the other points.

*Wilde*, Serjt., in support of the demurrer. It is no justification of slander to say, that it is only the repetition of what has before been published by another; and, at all events, such a plea is no justification of a libel. A resolution in Lord *Northampton's* case, 12 Rep. 134, is the only authority which can be adduced in support of such a position. Lord *Coke* there says, "In an action for slander of a common person, if J. S. publish that he hath heard J. N. say, that J. G. was a traitor or thief, in an action on the case, if the truth be such, he may justify." But, first, the resolution is extrajudicial, and inconsistent with the decision in the case;—according to which several slanderers, who had vouched each other in succession, were punished in the star-chamber, notwithstanding such voucher;—and seems to have arisen from a misapplication of the law regarding false political rumours, which were made punishable by stat. 2 R. 2, c. 5, 3 Ed. 1, c. 34, and for the repression of which it was not necessary to punish any but the first propagator;

Secondly, the 12th part of Lord *Coke's* reports is a book of but questionable authority. *Holroyd*, J., said, in *Lewis v. Walter*, 4 B. & A. 614, it "is not so accurate as the rest of the reports of Lord *Coke*, not having been published by him in his lifetime, but from his notes afterwards." And though some dicta may be found confirmatory of the resolution in Lord *Northampton's* case, and some cases in which it has been treated as authority, there is no accredited decision which establishes the point, but many the other way. *Crawford v. Middleton*, 1 Lev. 82,—where the plaintiff having declared for slanderous words charging him with felony, said by the defendant to have been spoken of the plaintiff by a person whom the defendant met on the road, judgment was arrested by the opinion of three judges against Twysden, for want of an averment that nobody had said such words to the defendant,—is overruled by the decisions in *Gardner v. Atwater*, Say. 265, and *Woolnoth v. Meadows*, 5 East, 463; and in *Lewes v. Walter*, Cro. Jac. 406, 413, it was holden, that an averment in the declaration that the defendant had not heard the reports he propagated, was only necessary in cases on the statutes touching the propagators of political rumours.

It cannot be denied that the rule in Lord *Northampton's* case was, without investigation, assumed to be law in *Davis v. Lewis*, 7 T. R. 17, and in *Woolnoth v. Meadows*. But if the rule be shown to be destitute of authority, the decisions resting on it must fall to the ground; and in *Maitland v. Goldney*, 2 East, 426, Lord *Ellenborough* held, that one who repeated slander, after knowing it to be unfounded, could not justify it by having named his author at the time. In *Gardner v. Atwater*, upon a motion in arrest of judgment, in an action upon the case for words spoken, it was held, that the plaintiff need not negative, in his declaration, the fact of the words having been spoken before by another. In *Lewis v. Walter*, 4 B. & A. 615, *Holroyd*, J., said, "The rule has been laid down too largely in the Earl of *Northampton's* case, and ought to be qualified, by confining it to cases where there is a fair and just reason for the repetition of the slander:" and *Best*, J., said, "The reasons given by my Brother *Holroyd* show that the fourth resolution in that case requires some qualification; for it cannot be justifiable to repeat slander under all circumstances, but only in those cases where it is done, not for the purpose of merely circulating the slander, but for some fair and reasonable cause." It would be most mischievous if a slander could be justified on the bare statement that it has been uttered by some other person; for, if so, a person whose station and credit might give weight to a false report, might collude with one of no substance, against whom it would be in vain for the party injured to seek redress.

Thirdly, even admitting the resolution in Lord *Northampton's* case to be

law, it applies only to the repetition of slander, and cannot be extended to libel. *Lewis v. Walter* is an express authority to this effect; and *McGregor v. Thwaites*, 3 B. & C. 24, establishes the material distinction between libel and slander. Not only will an action lie for charges in writing, which would not lie for the same charges made orally, but the injury done by a publication in writing is infinitely more extensive and durable: it may be sent forth to the ends of the earth, and may endure as long as the material to which it is committed; while mere slander must speedily be forgotten.

Lastly, the plea is ill, even according to the law in Lord *Northampton's* case, for it does not give the plaintiff any action over against the author of the slander: Lady De Crespigny, one of the alleged authors, being dead; it being doubtful whether an action would lie against Mr. Heaton De Crespigny, the other author, inasmuch as his communication to the defendant was confidential; and it being clear that such an action could not be sustained without the testimony of the defendant, who would be an incompetent witness by reason of his interest in the verdict. The plea does not even allege that Mr. H. De Crespigny published the report; that it was published by the defendant without malice; that it was true; or even that the defendant believed it. Lord *Coke* himself admits, in Lord *Northampton's* case, "If J. S. publish that he hath heard generally, without a certain author, that J. G. was a traitor or thief, there an action sur le case lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any but against himself who published the words, although that, in truth, he might hear them; for otherwise this might tend to a great slander of an innocent; for if one who hath lessam phantasiam, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally, that he had heard scandalous words without mentioning of his author, that would give greater colour and probability that the words were true in respect of the credit of the reporter, than if the author himself should be mentioned,—for the reputation and good name of every man is dear and precious to him."

*Spankie*, Serjt., contra. Actions for slander and libel are founded on malice or falsehood, and it is sufficient that the plea negatives one or the other. It is *prima facie* a sufficient negation of malice, that the defendant is not the author of the libel, and that he only repeats what he has been told: it is not to be assumed that the mere repetition is malicious, and the defendant is not bound to negative malice by anticipation: if the repetition were the result of malice, the plaintiff should allege that by way of reply. The resolution in Lord *Northampton's* case has always been taken as undisputed authority; was confirmed by Lord *Kenyon* in *Davis v. Lewis*, and is not now to be shaken by the crotchets of antiquaries. But the law of that resolution does not rest on Lord *Northampton's* case: that case was decided in 10 Jac. 1. But *Lewes v. Walter*, Roll. Rep. 444, which was decided shortly afterwards, refers to *Dame Morrison v. Cade*, Cro. Jac. 1, 162, Jac. 1, in which the declaration negatives that the defendant had heard from any other the report he had circulated. *Maitland v. Goldney* may also be deemed an authority in support of the plea; for, by deciding that the defendant was not justified in propagating, because he had heard it from others, a report which he knew to be false, the Court in a manner leave it to be inferred, that the having heard it would have been a sufficient justification for repeating it, if the defendant had not known it to be false. In 1 Roll. Abr. 64 (C), the doctrine is laid down without qualification.

It is true, the resolution in Lord *Northampton's* case applies only to slander, but there is no substantial distinction between slander and libel, and the principles which are applicable to the one, are equally applicable to the

other. If the defendant received the report from a beggar, or one drunk or mad, or one that had *læsam phantasiam*, that would be matter for replication; but, *primâ facie*, he discharges himself of malice by pleading that he is not the author of the report.

The publication of the report by the first author is sufficiently averred in this plea, *Styles v. Nokes*, 7 East, 492; and the author is sufficiently designated to enable the plaintiff to sue him: it is not the defendant's fault, if, from technical reasons, difficulties afterwards arise in the way of evidence.

*Wilde.* The cases anterior to Lord *Northampton's* case, as well as the fourth resolution in that case, proceeded on a misapplication on the statutes respecting political rumours, which statutes were never directed against injuries arising from private slander. This is confirmed by the authority which has been referred to in Rolle, ending with these words, "according to the law of news:" that is, the law on those statutes touching public rumours.

It may be conceded that a plea in an action such as the present is sufficient if it negatives either the falsehood or the malice of the report: but it must negative them expressly; and these pleas do neither.

*Cur. adv. vult.*

BEST, C. J. Great industry has been bestowed upon this case by my learned brothers, by whom it was argued; but no case has been cited, in which the principle, extrajudicially applied by the fourth resolution in Lord *Northampton's* case to oral slander, has been extended to libel. We might relieve ourselves from the difficulty of deciding this question, by saying that the technical objections taken to the pleas by the demurrer are sufficient to entitle the plaintiff to judgment. But we think it more proper for us to pronounce our judgment on the principal question raised by these pleadings, namely, Whether a man who receives from the hands of another a libel on any person, is justified in publishing that libel, provided that in his publication the name of the person from whom he received it is mentioned. We do not hesitate to say, that even if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of his speaking the words names the person who told him what he relates, he may plead to an action brought against him, that the person whom he names did tell him what he related,—such a justification cannot be pleaded to an action for the republication of the libel.

If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove.

The reason which Lord Coke gives, why in the case of oral slander you should name the author, proves that you must not be allowed to publish written calumny; he says, that unless you mention the name of the author, it might be a great slander of an innocent; "for if one who has *læsam*

phantasiam, or is a drunkard, or of no estimation, speaks scandalous words. if it shall be lawful for a man of credit to report generally that he had heard scandalous words without mentioning his author, that would give greater color and probability that the words were true in respect of the credit of the reporter than if the author were mentioned, for the reputation of every good man is dear and precious to him." Of what use is it to send the name of the author with a libel that is to pass into a country where he is entirely unknown; the name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic. There is no allegation, in this case, that the defendant believed this statement; on the contrary, it is to be observed, that Mr. De Crespigny struck out a very material part of the statement, and yet the defendant published it, although he must have known that it was not correct. I allude to that part in which the defendant makes Mr. De Crespigny say, that his mother had told him that a child had been born. Although he tells you in his plea that De Crespigny had erased those words, yet he justifies the publishing of them. The declarations of a son and dying wife are made the means of blasting the character of a father and husband. If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the characters of any persons they might be disposed to calumniate; there will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish such as will pay for them with any statements they may desire respecting the character of any person whatsoever.

Written communications are often made for the information of those to whom they are given, and for their information only. Such communications contain facts necessary to be known by those to whom they are made, but not fit to be divulged to the whole world. It may be important to the interest of the members of a family to know of things which have taken place in their family, and which, having been disclosed with a due regard to the interest of the person to whom the disclosure was made, although injurious to some other person's character, would not be libellous. Can it be permitted that persons possessing such communications should publish them to the world if they only give the names of those by whom they were made? Such a doctrine might furnish amusement for the lovers of scandal, but it would cause much misery in many families. It is a principle of our law, that whoever wilfully assists in the doing an unlawful act, becomes answerable for all the consequences of such act: what reason is there to except the circulation of slander out of this rule? He who prints and publishes what was given to him in manuscript, has to answer for by far the greatest part of the mischief that the statement has occasioned. But it has been said at the bar that these pleas are *prima facie* answers, and that the circumstances that are to show that the publication was not honestly made are to come from the plaintiff in his replication, or to be proved under the general replication *de injuria*. The defendant ought to know the state of the author, and the circumstances in which he wrote the libel. The plaintiff may be ignorant of those circumstances: the law requires that facts should be proved by those who ought to have the means of know-

ing them, and not by those who must be presumed ignorant of them. But these pleas do not present a *prima facie* defence. They offer nothing which requires an answer. Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong. If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. This seems to be a case of the latter description: but, if published either with or without the authority of the writer, it can never be a justification, nor can the previous publication be set up in mitigation of damages, without proof that the author believed it true, and had some reasonable cause for publishing it. We are not to endure a reproach against our neighbor. What, then, is our moral duty, if we hear any thing injurious to the character of another? If what we have been told does not concern the public or the administration of justice, we are to lock it up for ever in our own breasts. We are on no account to report it to gratify our enmity to any particular person, or, for that more common cause of slander, to gratify the malice that exists by a desire to raise ourselves above, or to keep ourselves upon an equality with, our neighbors by injuring their characters.

The statements published relative to the plaintiff do not concern the public; they are not disclosed in the course of the administration of justice; nor does it appear from the pleadings that the defendant, in making this virulent attack on the plaintiff, has the excuse that he published this paper in his own defence: but before he used this statement in any manner, he was bound to satisfy himself that it was true; and he does not even say that he believed it. Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter. We are warranted in saying that the defendant has made a very serious charge against the character of the plaintiff, without being prepared to make it good; for if he could have proved that what he published was true, he might have put the truth of the statement on the record as his justification.

Judgment for the plaintiff.

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CHARLES CARTER v. ROBERT CARTER and Others. — p. 406.

1. A payment of ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment because the ground-landlord, on demanding it, allows the occupier time to pay.
2. *Growing* rent may be discharged by such payments, as well as rent actually due.
3. Where growing rent has been reduced by payments of land-tax, &c., if the landlord distrains for the whole sum reserved, the tenant may properly sue in case.

CASE for wrongfully distraining for 25*l.*, when only 5*l.* 10*s.* was due. There were also counts for an excessive distress, a wrongful distress, and a count in trover.

At the trial, before *Best*, C. J., Middlesex sittings, after Michaelmas term, the facts were as follows : —

The plaintiff rented a house of the defendant, Carter, at 50*l.* a year. Shortly after he had paid his half-year's rent, due Lady-day, 1827, the ground-landlord's steward called on him for 8*l.* 10*s.* ground-rent, due the Christmas preceding, and 8*l.* 10*s.* due at Michaelmas preceding. The plaintiff complained of the hardship of such a demand just after he had paid the rent of his immediate landlord, and prayed for time. The steward gave him time : 8*l.* 10*s.* was paid in the following July, and 8*l.* 10*s.* in September. The steward stated that he never called on the occupier for the ground-rent, unless default had been made by the immediate lessee, which was the case in the present instance.

In September, 1827, the plaintiff, being called on to do so, also paid 2*l.* 10*s.* for land-tax, due at Michaelmas, 1826, and Lady-day and Michaelmas, 1827.

In November following, the defendant Carter demanded of the plaintiff 25*l.* for half a year's rent, alleged to be due the preceding Michaelmas. The plaintiff tendered him in discharge 5*l.* 10*s.*, and the receipts for the ground-rent and land-tax as above.

This the defendant refused to accept, and distrained for the whole 25*l.*

On the part of the defendant, it was objected that the action was improperly conceived ; that none of the counts in the declaration were adapted to the plaintiff's case ; and that if any wrong had been done to the plaintiff, his remedy was not case, but replevin, in which, to an avowry for the rent, he might have pleaded the payment of the ground-rent, &c. ; *Sapsford v. Fletcher*, 4 T. R. 511 ; *Taylor v. Zamira*. 6 Taunt. 524 ; that the defendant, however, was entitled to distrain for the whole rent due at Michaelmas ; no set-off being permitted in cases of distress, *Andrew v. Hancock*, 1 B. & B. 37, the distress could not be answered by any thing but payment ; and payment could only be of a debt due ; the discharge of the ground-rent, therefore, by the plaintiff, could not operate as payment of the rack-rent, because at the time the ground-rent was discharged, the rack-rent in question was not due.

At all events no payment would go in discharge of rack-rent, but a payment by compulsion ; and here the plaintiff could not be said to have paid upon compulsion, when the ground-landlord's steward allowed him time to pay at his convenience.

A verdict having been found for the plaintiff.

*Wilde*, Serjt., obtained a rule nisi to set it aside upon the foregoing objections.

*Andrews*, Serjt., showed cause. The action is properly conceived in case, for replevin only lies where *no* rent is due, and in the present instance the plaintiff has no remedy if he cannot sue in case. And the payment of ground-rent and land-tax may operate as payment of rack-rent growing due, as well as of rack-rent actually due. In *Stubbs v. Parsons*, 3 B. & A. 516, *Bayley*, J., said, "The law considers the payment of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord."

The circumstance that the ground-landlord allowed the plaintiff time to

pay the ground-rent, after it was demanded, does not render it the less a compulsory payment. The defendant had failed to pay it, and the plaintiff, notwithstanding the indulgence granted him, paid under a liability to distress.

*Bompas, Serjt., (for Wilde,)* relied on the objections urged at the trial. *BEST, C. J.* The great stand made at the trial, on the part of the defendant, was, that this payment by the plaintiff was a voluntary payment. I thought then, and am still of the same opinion, that it was not a voluntary payment. The plaintiff was liable to be distrained on for ground-rent. Having just paid his rack-rent, he prayed for time to pay the ground-rent. Six weeks were allowed, at the end of which time it was paid; but the defendant knew he was liable to distress, though not actually distrained on; and a payment under such circumstances is no more voluntary, than a donation to a beggar who presents a pistol. In *Sapsford v. Fletcher*, and *Taylor v. Zamira*, the payment of ground-rent by the occupier for the landlord, was holden not to constitute a cross demand, but to amount to payment of so much of the occupier's rent. Here, by the same means, all the plaintiff's rent had been paid but 5*l.* 10*s.*, notwithstanding which the defendant distrains for 25*l.*; he is, therefore, clearly liable on the count which states the excessive distress in that way. The substantial question here is, Was more than 5*l.* 10*s.* due to the defendant for that had been offered, and the jury find that that was all he was entitled to. Several of the counts are applicable; and if the whole distress were wrongful, the count in trover is of itself sufficient, as was established in *Branscomb v. Bridges*, 1 B. & C. 145.

*PARK, J.* It is quite clear this was not a voluntary payment. The plaintiff was all along liable to a distress by the ground landlord, and if time had not been given, would have been distrained on.

Then, it has been expressly decided in *Sapsford v. Fletcher*, and *Taylor v. Zamira*, that the occupier is entitled to deduct from his own rent payments so made. But it has been argued that he cannot deduct, from rent growing due, payments for the ground-rent of an antecedent half year, and *Andrews v. Hancock* has been referred to. But in that case the occupier for several years, subsequently to paying the ground-rents, made an entire payment of his own rent, and then sought to deduct the ground-rents so paid from a subsequent year's rent. Here the plaintiff seeks to make the deduction from the first payment of rent accruing due after the ground-rent had been demanded and paid. It would be most unjust to refuse this, and the rule which has been obtained must be

Discharged.

*BURROUGH, J., and GASELEE, J.,* were absent.

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BRIDGES v. SMYTH.—p. 410.

A landlord, having treated an occupier of his land as a trespasser, by serving him with an ejectment, cannot afterwards distrain on him for rent, although the ejectment is directed against the claim of a third person, who comes in and defends in lieu of the occupier, and the occupier is aware of that circumstance, and is never turned out of possession.

*REPLEVIN.* Avowry for thirteen and a half years' rent, alleged to be due at Lady-day, 1827, on a demise at 38*l.* a year, payable half-yearly.



Pleas, non tenuit, riens en arriere, and eviction in September, 1823, and issue thereon.

At the trial, before *Holroyd*, J., last Suffolk assizes, it appeared that at Michaelmas, 1807, Sir Harvey Smyth demised the premises to plaintiff for ten years, at a rent of 382*l.* a year. A part of them was copyhold.

He died in 1811, when the property descended to Mrs. Brandt, who died in February, 1814, and devised it to defendant for her life.

The defendant refused the property as devisee, thinking she had a title as heir; but as she delayed to take any steps in the business, the lady of the manor seized the copyhold part of the premises on the defendant's neglect to be admitted, and, after obtaining judgment in an ejectment received the rent of that part, amounting, from 1815 to 1820, to 200*l.* a year, and afterwards to 170*l.*

In 1823, Sir G. H. Smyth, the real heir at law of Mrs. Brandt, encouraged by the defendant's neglect, brought an ejectment against the plaintiff, and sued out a writ of possession thereon in January, 1824. The plaintiff, however, was suffered to remain on the premises.

The defendant, thereupon, in February, 1824, with a view to defeat Sir G. H. Smyth's claim to the property, and after consulting with the plaintiff on the subject, brought an ejectment against the plaintiff, the demise in which was laid March 2, 1814. By the consent rule Sir G. H. Smyth came in and defended as landlord; and the defendant having by means of her title as devisee recovered in the action, (a) a writ of possession was made out for her in 1827, but was not executed, as she refused to pay the sheriff's poundage. She had been admitted to the copyhold part in 1825. The plaintiff was never actually out of the possession of the premises; but the defendant had notice of all the foregoing proceedings. Nothing was proved amounting to an admission by the plaintiff that she held under a demise at 382*l.* a year.

It was objected at the trial, that whatever claim the defendant might have against the plaintiff in an action of trespass for mesne profits, she had no right, under the above circumstances, to distrain; and the learned Judge being of this opinion, a verdict was taken for the plaintiff, with leave for the defendant to move to enter a verdict for such sums as the Court should think the defendant entitled to.

*Wilde*, Serjt., having obtained a rule nisi accordingly,

*Storks*, Serjt., who showed cause, contended that at the time of the distress, there was no demise subsisting on which the defendant could avow for rent. The demise from Sir H. Smyth had expired in 1817, and so far was the plaintiff from occupying under a tenancy continuing from that demise, that the defendant had, by her demise in the ejectment, treated her as a trespasser from the 2d of March, 1814. *Russell*, Serjt., was to have followed on the same side, but the Court called on

*Wilde* to support his rule. The plaintiff never having been turned out of possession, there has been no determination of her tenancy; and as she never objected to the terms of the lease, which expired in 1817, it must be inferred she continued to hold on the same terms. The ejectment by Sir G. H. Smyth does not affect the defendant's right; that was a proceeding by a wrong-doer without title, for which the defendant is in no way responsible; and in the ejectment by the defendant, the plaintiff's name was only inserted for form, the party really concerned being Sir G.

(a) See *Doc*, d. *Smyth*, v. *Smyth*, 6 B. & C. 112.

**H. Smyth** It was not an adverse proceeding against the plaintiff, as appears by the defendant's refusing to execute a writ of possession. There is no evidence, therefore, to support the plea of eviction. As to the proceeding by the lady of the manor, it was never carried to the length of an ouster; it does not appear that the plaintiff ever communicated it to the defendant; and the defendant was subsequently admitted to the copyhold part of the property; so that, at the time of the distress, the plaintiff was tenant to her of the whole; and the terms under which she occupied, from 1807 to 1817, having never been objected to, it may be presumed she consented to continue on the same terms.

But *the Court* were clearly of opinion, that whatever other remedy might be open to the defendant, she could not distrain as upon a contract between lessor and lessee, after treating the plaintiff as a trespasser, since 1814, by the demise in the ejectment of 1824; and that the circumstance of that ejectment having been directed against the claim of Sir G. H. Smyth made no difference in the case, judgment having been entered up against the casual ejector, which would be conclusive against the tenant.

Rule discharged.

VERE and others v. CARDEN. — p. 413.

A plea, false on the face of it, may be treated as a nullity.

The plaintiffs declared on two bills of exchange, due the 5th and 6th of December, 1828.

The defendant pleaded a judgment recovered on the same bills in the Michaelmas term preceding.

The plaintiff having treated this plea as a nullity, and signed judgment, the plea being false on the face of it,

*Andrews*, Serjt., obtained a rule nisi to set aside the judgment.

*Wilde*, Serjt., for the plaintiffs, relied on *Lamb v. Pratt*, 1 D. & R. 577, and

*The Court*, after hearing *Andrews*, discharged the rule with costs.

BRYANT v. Sir JOHN PERRING. — p. 414.

A defendant may plead matter puis darrein continuance, notwithstanding an order to rejoin issuably.

THE defendant had pleaded a release. The plaintiff replied that the release was conditional, on the defendant's doing certain things to the satisfaction of A. and B., and alleged non-fulfilment of the condition. On the first day of term, he ruled defendant to rejoin by the 26th of January.

On the 26th, the defendant obtained, under a Judge's order, three days' further time to rejoin, upon the terms of rejoining issuably, and taking short notice of trial for the last sittings in term.

On the 29th, A. and B. gave a certificate of the defendant's having performed, to their satisfaction, the things required; and this certificate the defendant that evening pleaded puis darrein continuance.

The plaintiff thereupon signed judgment, on the ground that the defendant had not rejoined issuably within the time limited.

*Russell*, Serjt., having obtained a rule nisi to set aside this judgment as irregular,

*Jones*, Serjt., who showed cause, contended that the judgment was regular, the defendant having wholly neglected the terms of the Judge's order; that a plea puis darrein continuance was no rejoinder at all, much less an issuable rejoinder; that such a plea is treated with the same strictness as a plea in abatement; *Martin v. Wynill*, 1 Str. 494; and that a plea in abatement is not a compliance with an order to plead issuably; *Kilwick v. Maidman*, 1 Burr. 59; *Wagstaffe v. Long*, Barnes, 263; and he likened the case to that of executors, who are never allowed time to rejoin, except on condition that they shall not confess any new judgments. But

The Court held that this was a matter altogether independent of the Judge's order, insomuch that even had the defendant rejoined issuably, he might afterwards, upon apt occasion, plead puis darrein continuance.

Rule absolute.

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STEWART v. WILLIAMSON. — p. 415.

Where a party to an arbitration under a rule of court revoked the arbitrator's authority upon discovering improper conduct, and then, having sued for, and recovered by action, damages for the matter in dispute, went to reside in Scotland, the Court refused to stay execution upon the application of the adverse party, who proposed thereby to compel him to appear to an action on the arbitration-bond, the arbitrator having awarded against him, notwithstanding the revocation of authority.

The plaintiff having claims against the defendant for the hire of a ship under a charter-party, which claims the defendant disputed, the matters in difference were referred to two arbitrators and an umpire, and the reference was made a rule of Court; the parties having executed bonds to abide by the award in the penalty of 3000*l*.

On the 26th of April, some days after the parties had concluded their respective cases, the plaintiff revoked his authority to the arbitrators, and went to reside in Scotland, notwithstanding which, on the 28th of April, one of the arbitrators and the umpire made an award, in which they found that nothing was due from the defendant to the plaintiff, and ordered the plaintiff to pay half the costs of the arbitration.

The plaintiff then commenced an action on the charter-party in this Court, and at the sittings after last term obtained a verdict for 1500*l*., which the defendant was unable to set aside.

The plaintiff having now sued out execution,

*Taddy*, Serjt., upon an affidavit stating the foregoing facts, and also that in the present term an action had been commenced against the plaintiff on the arbitration bond, but that it was impossible to serve him with process, because he resided in Scotland for the avowed purpose of eluding it, obtained a rule nisi, upon paying into Court the moneys recovered, to stay the proceedings in the execution till the further order of the Court; proposing thereby to compel the plaintiff to appear to the action on the arbitration-bond.

*Wilde*, Serjt., showed cause, upon an affidavit which stated that the plaintiff had revoked his submission in consequence of the corrupt con-

duct of one of the arbitrators, and specified many improper acts, saving of bribery.

*Taddy* and *Spankie*, Serjts., in support of the rule, endeavored to explain the arbitrators' conduct, but the facts were too strong. They contended, however, that it was a contempt of the rule of Court for the plaintiff to revoke his submission, and that instead of doing so he should have brought forward the facts on which he relied, as an answer to an application for an attachment, or have applied to the Court under the statute of William.

BEST, C. J. I do not think it a contempt to revoke an order of reference, when the arbitrator has indirectly taken a bribe. As to the remedy for corruption in an arbitrator under the statute of William, that does not deprive the party of the power of rendering it unnecessary, by revoking the order in the first instance. The rule must be discharged.

PARK, J. This is an application of some novelty, amounting in effect to a special distringas, and calling on us to levy issues to the amount of 1500*l.*; that is, to tie it up in the hands of the officer of the Court until the party applied against shall enter his appearance.

If he had withdrawn from the process of the Court, there might perhaps have been some color for the application; but here he has been residing in Scotland for some time, and if the parties applying thought the revocation wrong, they should have sued on the bond at once, and not have lain by for two years. It is a most singular argument to say that the party is to go on with the arbitration after the arbitrator has received money from the other side, because he may afterwards obtain redress on the statute of William.

There is no color for this application.

BURROUGH, J., and GASELEE, J., agreed that there was no ground for the application, and the rule was discharged.

Rule discharged accordingly.

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#### BOUSFIELD and Another v. GODFREY.—p. 418.

Where defendant surreptitiously obtained possession of an unstamped agreement executed by himself and the plaintiff, (thereby preventing the plaintiff from affixing a stamp, as he had intended, in twenty-one days after execution,) and then swore that he had lost the agreement, the Court ordered that he should produce a copy in his possession to the plaintiff, and that if the plaintiff produced that copy stamped at the trial, the defendant should be precluded from producing the original.

THIS was an action upon an agreement executed by the defendant and the plaintiffs.

A Judge at chambers having made an order that the defendant should produce the original agreement to the plaintiffs' attorney, in order that it might be stamped at the expense of the plaintiffs' and should deliver a copy of it to them; and that in default of such production the defendant's attorney should deliver to the plaintiff's attorney a copy of a copy of the agreement, which the defendant's attorney admitted to be in his possession; and that upon such copy of the copy being read in evidence at the trial, the defendant should be precluded from producing the original,

*Cross*, Serjt., moved for a rule nisi to discharge this order, upon an affidavit of the defendant, in which he deposed, among other things, that the agreement in question had never been stamped; that upon the occasion of a

change of residence, he believed he had lost or burnt it; that he had no knowledge whatever where it now was, and that he had never seen it since February, 1828. —

*Cross* contended that compliance with the order as to the original agreement was impossible, and that it ought not to be required if possible, because by compliance the defendant would subject himself to the penalties imposed by 9 & 10 W. & M. c. 25, s. 59, and 23 G. 3, c. 58, for executing agreements unstamped. Then, if the unstamped original were lost, or even wrongfully destroyed by one of the parties, a copy could not be received in evidence. *Rippiner v. Wright*, 2 B. & A. 478. A rule nisi having been granted,

*Wilde*, Serjt., showed cause, upon affidavits which stated that the plaintiffs intended to have had the agreement stamped within the time allowed by law; that at the defendant's request it was arranged that the agreement should be placed in the hands of Rogers, a mutual friend of all parties; that the defendant, however, prevailed on Rogers to allow him to take it home under pretence of making a copy, and that they had never since been able to get it out of his hands. Letters and admissions of the defendant were then deposed to, which showed clearly that the agreement was in existence, and in his hands, as late as August, 1828; and it was upon this evidence that the judge's order had been issued. *Wilde* contended that the penalties imposed by the earlier statutes had been virtually repealed by the 55 G. 3, c. 184, which enables a party to stamp an agreement within twenty-one days after execution, as the plaintiffs would have done in this case if not prevented by the defendant; which distinguished the case from *Rippiner v. Wright*. *Bateman v. Phillips*, 4 Taunt. 157, *Morrow v. Saunders*, 1 B. & B. 318, and *Cooke v. Tanswell*, 1 B. M. 465, were express authorities in favour of the application.

*Cross* asserted that the original could not now be found; that the stamp-office would not stamp a copy; and that the interests of the revenue required that evidence of the agreement should not be given without a stamp. He relied on *Rippiner v. Wright*.

*BEST*, C. J. It is impossible to doubt that the agreement is in existence, for the defendant's affidavit is contradicted by his own letters. And according to his own statement, he fraudulently prevailed on Rogers to allow him to take it home, while the plaintiff expressly swears that he meant to have it stamped. I feel no difficulty, therefore, in ordering the defendant to produce it, if he has it; and if not, to produce the copy, to be taken to the stamp-office. If the office think fit to stamp the copy it may be produced at the trial, and the defendant shall be precluded from producing the original to defeat it.

This will in nowise injure the revenue, and does not impeach the case of *Rippiner v. Wright*. But the stamp-office is not to be made an engine to assist the defendant in his own iniquity.

We should not have decided thus if the stamp ought to have been on the instrument at the time of execution. But no offence was committed at that time, because the parties have twenty-one days to affix the stamp. If there were any offence it was the defendant's, because he, having retained the agreement, ought to have stamped it; and he is not to be permitted to take advantage of his own wrong.

The rest of the Court concurring, the copy was handed over to the plaintiff's attorney in court; and it was then ordered that

If the plaintiff should upon the trial of the cause produce the copy of the agreement that day delivered over in court, duly stamped, the defendant should not be permitted at the trial to produce the original agreement.

DOE, dem. FISHER, v. GILES and Others. — p. 421.

Where the mortgagor remains in possession, and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on non-payment, may eject the mortgagor without notice to quit, or demand of possession.

**EJECTMENT.** At the trial, before *Vaughan*, B., Shropshire Summer assizes, 1828, it appeared that by a mortgage deed bearing date 19th February, 1827, the defendant, Giles, conveyed the property in question to Fisher, with a power to enter and sell it absolutely in case 6200*l.*, borrowed on the security of the property, should not be paid with interest on the 19th of August, 1827.

The money not having been paid, Fisher commenced this action, and laid the demise on the 24th of September, 1827, up to which day no interest was paid.

No notice to quit was given, nor any demand of possession ever made.

Thereupon it was objected, that a mortgagor in possession is a tenant to the mortgagee; *Partridge v. Bere*, 5 B. & A. 604; and, if only a tenant at will, cannot be treated as a trespasser without a previous determination of the mortgagee's will by a demand of possession. A verdict was taken for the lessor of the plaintiff, with leave for the defendants to move to set it aside and enter a nonsuit.

*Cross*, Serjt., having obtained a rule nisi on the authority of *Partridge v. Bere*,

*Russell*, Serjt., showed cause.

A mortgagor in possession has no such interest as to entitle him to a notice to quit or even a demand of possession, upon a forfeiture of his estate by nonpayment of the mortgage money at the day agreed on.

The contract into which he has entered has fully apprised him that if the money be not paid, the property is instantly to pass over to the mortgagee, and it would be as unreasonable to require that he should receive formal notice of his own default (for a demand of possession would amount to no more), as to require for a lessee under a seven years' lease, half a year's notice to quit previous to the expiration of the seven years. But in *Keech v. Hall*, Dougl. 21, it is expressly laid down that the mortgagee may, without notice, eject a tenant of the mortgagor let into possession after the mortgage; and in *Moss v. Gallimore*, Ibid. 282, Lord *Mansfield* says, "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only quodam modo. Nothing is more apt to confound than a simile. When the Court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will." And in *Birch v. Wright*, 1 T. R. 382, *Buller*, J., says, "That a mortgagor has often been called a tenant at will to the mortgagee in courts of law and equity, is undoubtedly true; but I think inaccurately so; and the expression has been used when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will. In old cases he is sometimes called a tenant at will, and sometimes tenant at sufferance. In *Keech v. Hall*, *Wallace* called him the agent of the mortgagee, and Lord *Mansfield* stated him to be tenant at will to some purpose, but not to others. In *Moss v. Gallimore*, Lord *Mansfield* said, 'A mortgagor is not in reality a tenant to the mortgagee; if he were, he must pay rent, but that is not so. To many purposes he is like a tenant at will, but

he does not pay rent, he must pay interest only.' But if a likeness must be found, I think, as it was put by *Ashhurst, J.*, in *Moss v. Gallimore*, a mortgagor is as much if not more like a receiver than a tenant at will: in truth he is not either. He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee, I mean in ejectments brought for the recovery of mortgaged lands. If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will. But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will, some time back to the time when the mortgage became forfeited, and no objection has ever been made on that account."

And the decision in *Partridge v. Bere* has not altered the law; for, as *Buller, J.*, said in *Moss v. Gallimore*, "Expressions used in particular cases are to be understood with reference to the subject-matter then before the Court;" and in *Partridge v. Bere* the Court said, that a mortgagor in possession was tenant to the mortgagee, not for the purpose of laying down the respective rights of those two parties, but merely to prevent justice being defeated in a claim against a third party by an immaterial variance in the declaration. The plaintiff, there, declaring against the defendant for an injury to his reversion, had alleged that the property injured was in the possession of one Turner as his tenant: it turned out that the plaintiff had become entitled to the reversion under a mortgage from Turner, who remained in occupation: under those circumstances the Court might fairly decide that, as against a wrong doer, Turner might be called tenant to the plaintiff, without deciding that, as against the plaintiff, Turner had any such interest as would entitle him to a notice to quit, or even demand of possession. It was sufficient to satisfy the declaration if he were tenant by sufferance.

*Gross.* The mortgagor, when permitted by the mortgagee to remain in possession, becomes thereby his tenant at will, and as such entitled, before an ejectment is brought, to be informed of the determination of the mortgagor's will by a demand of possession. To deny him this, would operate with great hardship and injustice; because the mortgagee, by allowing him to remain in possession, impliedly rescinds the strict letter of the contract, and encourages him to sow in the fair expectation that he shall reap. If he be tenant at will, *Lord Coke* says, "The lessor may, by actual entry into the ground, determine his will in the absence of the lessee, but by words spoken from the ground the will is not determined, until the lessee hath notice." (*Co. Lit. 55 b.*) In *Keech v. Hall*, *Thunder v. Belcher*, 3 East, 449, and other cases which have decided that the mortgagee may eject without notice to quit, the mortgagor was not the person in possession, but some person claiming under him, and, by that circumstance alone, the mortgagor had himself determined the will. But in *Powseley v. Blackman*, Cro. Jac. 659, in order to support an ejectment against the heir of the mortgagor, the mortgagee entered before the ejectment.

In *Smartle v. Williams*, 1 Salk. 245, *Holt, C. J.*, says, "Upon executing the deed of mortgage, the mortgagor, by covenanting to enjoy till default of payment, is tenant at will." In *Moss v. Gallimore*, *Ashhurst, J.*, said, "Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered if there is an under-tenant, for there can be no such thing as an under-tenant to a tenant at will. The demise itself would be a determination of the will." And from what fell from *Buller, J.*, in *Birch v. Wright*, it may be collected, that what he laid down with respect to the mortgagor's interest, was not

meant to apply to cases where he is left in possession by the mortgagee; for he says, "Mr. J. *Ashhurst* said, in some respects a mortgagee is strictly tenant at will,—but that is not so here, for the mortgagor is not in possession."

Then, *Partridge v. Bere* is an express and a recent decision that the relation of landlord and tenant subsists between the mortgagee and the mortgagor in possession, and even on a tenancy at will the will must be determined in some way, before an ejectment can be brought: *Goodtitle v. Herbert*, 4 T. R. 680.

*Cur. adv. vult.*

BEST, C. J. This was an action of ejectment brought by a mortgagee against a mortgagor. By the mortgage-deed, if the principal sum remained unpaid on a given day, it was covenanted that the mortgagee might enter, and if not paid within thirty days from the day fixed for its payment, he was at liberty to proceed to a sale of the estate without the concurrence of the mortgagor.

This action was brought two days after the day on which the mortgagee had a right to reënter for non-payment, and before any interest had been paid on the money lent. It was insisted at the trial that an ejectment could not be brought until the mortgagee had required the mortgagor to deliver up possession of the estate.

My brother *Vaughan*, who tried the cause, reserved, for the consideration of the Court, the question, Whether this action could be maintained without a demand of the possession of the estate previous to the service of an ejectment.

It has never yet been decided that it is incumbent on a mortgagee to make such a demand previous to the commencement of an action of ejectment against the mortgagor. In *Partridge v. Bere*, which was an action brought by the plaintiff for an injury to his reversion, the Court thought that a mortgagee might describe himself as a reversioner, the mortgagor being in possession of the estate, and said that he was a tenant within the strictest definition of the word. This case comes nearer to the present than any I have been able to find.

But this was not a case between the mortgagee and the mortgagor in which the Courts were called upon to decide what are the rights of the one against the other. The defendant in that case was a wrong-doer, and had, therefore, no right to object to the plaintiff calling himself a reversioner as long as he permitted the mortgagor to be in possession of the land.

It has been argued that the mortgagor is tenant at will to the mortgagee; and, therefore, the latter can maintain no action against the former till that tenancy is determined. Lord *Mansfield*, in the case of *Moss v. Gallimore*, said, "That a mortgagor was not properly a tenant at will to the mortgagee, for he is not to pay him rent." In *Birch v. Wright*, Mr. Justice *Buller* says, "A mortgagor is not considered as a tenant at will in those proceedings which are in daily use between a mortgagor and a mortgagee; I mean in ejectments brought for the recovery of mortgaged lands."

This opinion of Mr. Justice *Buller* is directly to the point now in question. The words of Lord *Mansfield*, "he is not to pay him rent," are very important. The payment of rent countenances a right to the possession of the land; the payment of interest does not; it relates to the debt, and not to the property pledged. A landlord is not, by taking rent, to induce a man to sow the land, and then turn him out before he can



take the crop; and therefore a tenant at will has emblements, or may take the crop for his own use. Co. Lit. 55, b. Lord *Mansfield* says, in *Keech v. Hall*, "A mortgagor is not entitled to reap the crop as other tenants at will are, because all is liable to the debt." A mortgagor resembles a person who has executed a statute or recognizance. Whatever these persons do to give value to the property under pledge, is done for the benefit of the creditor.

In *Bardens* and *Withington's* case, 2 Leonard, 54, A. is bound in a statute to B., and sows the land; B. extends the lands, which are delivered to him in execution. It was adjudged, that the conusee shall have the corn sown. The same law in the case of a recognizance.

If the mortgagor is not a tenant at will, then the law relative to tenants at will has no application to this case.

We must look at the covenant he has made with the mortgagee to ascertain what his real situation is. We find from the deed between the parties, that the possession of his estate is secured to him until a certain day, and that if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee. And there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same.

If this situation exposes mortgagors to any hardship, they must guard against it by an alteration in the terms of the mortgage deeds. Mortgagees, however, do not find it to their advantage to enter upon the estates if they can get their interest regularly paid; for from the time that they get possession, their situation is far from desirable, from the constant state of preparation that they must be in to account to the mortgagor whenever he shall be ready to discharge the mortgage-debt.

This circumstance has rendered any security for the mortgagor against hasty actions of ejectment unnecessary.

The rule for a nonsuit must be discharged.

Rule discharged accordingly.

C A S E S  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,  
AND OTHER COURTS,  
IN  
EASTER TERM,

In the Tenth Year of the Reign of GEORGE IV.—1829.

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BURNS v. CARTER and Others. — p. 429.

The metropolis paving act, 57 G. 3, c. 29, s. 136, has repealed the Clink liberty paving act, 52 G. 3, c. 14, as to the time of commencing actions.

By the 52 G. 3 c. 14, an act for better paving the Clink liberty in the borough of Southwark, the commissioners appointed under the act, are empowered (s. 39) to compensate the occupiers of premises, if they require them to quit, after purchasing the premises under that act.

Section 122 enacts, that no action shall be commenced for anything done in pursuance of that act until twenty-one days' notice thereof shall be given in writing to the clerk or treasurer, or after sufficient satisfaction, or tender thereof, or after six calendar months after the fact committed, for which such action shall be brought.

By the metropolis general paving act, 57 G. 3 c. 29, s. 136, it is enacted, that no action shall be commenced for anything done in execution or pursuance of any local act or acts of parliament relating either exclusively or jointly with any other objects or purposes to the pavement of any parochial or other district within the jurisdiction of that act, until twenty-one days after notice in writing, &c., nor after three calendar months next after the fact may be committed for which such action shall be brought.

But by s. 138 of that act it is enacted, that neither any act or acts relating either exclusively, or jointly with any other objects, to the paving or repairing the pavements of the streets or public places in any parochial or other district within the jurisdiction of that act, shall be thereby repealed.

The plaintiff was in the occupation of a house in the Clink liberty; the defendants requiring the premises for purposes connected with the Clink paving act, paid a compensation to the parties who appeared to them to possess any interest in the same; and considering that the plaintiff had none, gave him notice to quit without any compensation. The plaintiff considering himself to be entitled to something, declined to quit, whereupon the defendants on the 13th of July, entered, and accomplished their objects.

On the 20th of August ensuing, the plaintiff gave them notice of an action of trespass, and commenced this action on the 11th of January, 1828.

At the trial before the Chief Baron, last Surrey assizes, it was objected that the action ought to have been commenced within three calendar months pursuant to the 57 G. 3, c. 29, s. 136, which, in that respect at least, it was contended, had repealed the 52 G. 3, c. 14, s. 122, and the learned Chief Baron being clearly of this opinion, the plaintiff was nonsuited; whereupon *Andrews*, Serjt., now moved to set aside the nonsuit, on the ground that this was in effect an action brought for a compensation; that the compensation sought, could only be given under the Clink paving act, and, therefore, must still be regulated by the terms of that act, notwithstanding the 136th section of 57 G. 3, c. 29, especially when the 138th section of that act had expressly provided that no local act relating to the pavement should be repealed. If the action were regulated by the Clink paving act, it was commenced in time.

*BEST*, C. J. Whatever may be the case as to other matters, with respect to the time for suing, the 57 G. 3, c. 29, is express, that for anything done under the local act, the action must be commenced within three calendar months. There is no ground for disturbing the nonsuit.

*PARK*, J. It has been ingeniously put by the learned Serjeant, that as in this instance the defendants could only proceed under the local act, the time for suing should also be regulated by that act. But when we see that s. 136 of the general act applies to all that is done under the local act, his ingenious fabric falls to the ground.

The rest of the Court concurred.

Rule refused.

### KNIGHT v. HUNT. — p. 432.

Plaintiff had refused to sign an agreement to receive of his debtor a composition of 10s. in the pound; but the debtor's brother offering to supply him with coal to the amount of the other 10s., he signed the composition agreement. The other creditors knew nothing of the coal transaction. Plaintiff having been supplied with the coals, Held, that he could not recover upon a promissory note for the amount of the 10s. composition.

ONE William Watson, being in bad circumstances, proposed to compound with his creditors for 10s. in the pound.

The plaintiff, to whom he owed 30l., refused to accede to the proposal. Whereupon John Watson, W. Watson's brother, went to the plaintiff, and spontaneously agreed at his own cost to supply the plaintiff with coals to the amount of 150l. if he would sign the agreement for William Watson's composition. The plaintiff consented, and then signed an agreement, dated October 20, 1818; "To take 10s. in the pound, to be paid with the other creditors." The plaintiff signed the last, but the arrangement about the coals was not known to the other creditors.

For the 10s. in the pound the plaintiff afterwards agreed to take the joint and several promissory note of William Watson, one Aldred, and the defendant, payable on demand, with interest.

The note was given, and bore date November 1, 1818. John Watson furnished the plaintiff with coals to the amount agreed on, and interest was paid on the promissory note.

The note, however, remaining unpaid, the plaintiff at length put it in suit against the defendant.

At the trial, before *Littledale*, J., last Winchester assizes, a verdict was, upon proof of the foregoing facts, found for the defendant, on the ground that the plaintiff had, by the amount in coals delivered by John Watson, received as much as the other creditors, and that any contract for more was void as a fraud on them.

*Bompas*, Serjt., now moved to set aside this verdict, and for a new trial. He contended that the coal transaction was no fraud on the other creditors, and he distinguished the case from all the cases on composition agreements, (beginning with *Cockshott v. Bennett*, 2 T. R. 763, and ending with *Thomas v. Courtney*, 1 B. & A. 1,) in the following respects:—

1st, That this was not by or at the instigation of the insolvent, nor even at the request of the creditor, but was a spontaneous and honorable offer on the part of a relation of the debtor, to make up, out of his own substance, a loss occasioned by his brother.

2dly, That it was attended with no detriment, either to the insolvent or the creditors at large; and the ground of many of the decisions was, the injury to the general body of creditors.

3dly, That, inasmuch as the plaintiff was the last to sign, the other creditors could not have been influenced by his supposed concurrence.

Lastly, he contended, that though an agreement for a particular creditor to receive more than the others was void in itself, and though it might under some circumstances avoid a release given to the debtor, yet it had never been holden to avoid the debtor's stipulation to pay the sum specified in the composition deed. The plaintiff might, perhaps, have failed to enforce John Watson's agreement to supply him with coals, but that would not affect the validity of the debtor's agreement to pay 10s. in the pound, or of a note given in pursuance of such agreement.

BEST, C. J. There is not the slightest pretence for this motion. These agreements for composition with creditors require the strictest good faith. If I see a man, acquainted with the circumstances of the debtor, agreeing to sign a paper, under which he is to be satisfied with 10s. in the pound, I conclude he has exercised a judgment on the subject. Am I not cheated if he procures another to give him 10s. more? Perhaps there is no case exactly like this; but as no two cases are ever alike in all respects, the best way is to extract a principle from analogous decisions; and the principle to be extracted from all the cases on this subject is, that a man who enters into an engagement of this kind is not to be deceived.

It has been argued, that here the debtor was not injured, nor the funds for other creditors rendered less available. No doubt those topics have been urged in some of the cases; but one question always is, Whether the judgment of the creditors has been influenced by the supposition, that all are to suffer in the same proportion. That was the case here. It is a very different thing, where, without any previous contract, a debtor, after having discharged his engagements under the composition deed, honorably adds the remainder. A transaction of that kind is clearly distinguishable from the present, where, by previous and express contract, the whole of the debt, or an equivalent, is secured to a particular creditor. Here the plaintiff has had his 10s. in the pound in coal, and he cannot have it again in money.

PARK, J. It seems to me only necessary to distinguish between a gratuitous gift after the payment under the composition, and a previous un-

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derstanding that a particular creditor shall receive more than the others. Here there was such a previous understanding, and the verdict was perfectly proper.

BURROUGH, J., and GASELEE, J., concurring,

The rule was refused.

PROVIS and ROWE v. REED.—p. 435.

1. Where one of the attesting witnesses to a will is dead, witnesses may be called to his character.
2. Declarations of the testator in subversion of a will are not admissible in evidence though both parties claim under him, and though they are offered with a view to show the manner in which the will was executed.

WRIT of entry sur abatement.

The demandants claimed as heirs of Henry Sara. The defendant, (who had been in possession twenty-seven years,) under his will.

The demandants proposed to show that the will was executed in the presence of only two attesting witnesses, and that the name of a third was added after the death of the devisor.

At the trial, before *Gaselee*, J., last Cornwall assizes, the demandant's pedigree having been admitted, the learned Judge ruled that the defendant was entitled to begin, and he having by one of the attesting witnesses (a servant of the devisor) established the due execution of the will in the presence of three witnesses, one of whom was Mr. Scott, the attorney who had prepared the will, but was since dead, as well as the third attesting witness,

The demandants called a person who deposed that the day after the death of the devisor, Mr. Scott said to him, "There is an oversight; the will is not properly executed; but it is not of much consequence; we can manage it between ourselves;" that he then called a female, and desired her to write her name under those of the two attesting witnesses.

The demandants then proposed to give evidence of the following among other declarations made by the devisor, touching the will:—

"Tom Reed (the defendant) has been trying to get my property, but neither he nor his shall have it. Scott drew up a paper, and they got me to sign it; but never fear; I know that it is not worth, to Reed, one farthing."—"My land goes to my own family. Peggy, (one of the demandants,) remember the land is yours; if I don't live to make my will, when I'm dead see that you are righted."

The learned Judge rejected the evidence, and on the part of the defendant admitted witnesses to speak to the character of Scott, the attorney, who had prepared the will.

His character being of the highest order, the jury found a verdict for the defendant; whereupon

*Taddy*, Serjt., now moved for a new trial, on the ground that evidence of the testator's declarations had been improperly rejected, and evidence of the character of the attesting witness improperly admitted. Although in general declarations could not be received to defeat a written instrument yet these were admissible on two grounds: first, because they were the declarations of one under whom both parties claimed; the declarations, as it were, of an ancestor, a privy in estate; and secondly, because they were not offered to contradict the will, but merely to show whether two or three

witnesses were present at the execution. The evidence was quite dehors the will, and went to a fact altogether independent of the construction of the instrument.

Then, Scott's character had nothing to do with the issue in the cause; evidence of character had never before been received in answer to naked facts. No issue had been joined on the character of Scott, and if the defendant was entitled to offer evidence of his good character, the demandants must have been equally entitled to offer evidence of an opposite description. They could not be prepared on such a point, and the power of raising it would lead to the utmost inconvenience. The rule in *Bull. N. P. 295*, was expressly contrary, and made no distinction in favour of witnesses to wills. [*Gaselee, J.* The same evidence was admitted in *Doe d. Walker v. Stephenson*, 3 Esp. N. P. C. 284, and that case was recognised in *Bishop of Durham v. Beaumont*, 1 Campb. 210.] They are only *Nisi Prius* decisions, and the case in *Espinasse* can scarcely be law, since, there, evidence is said to have been called to the character of two witnesses who were unimpeached.

BEST, C. J. Two objections have been made to the verdict in this cause: that evidence has been rejected which ought to have been received, and evidence received which ought to have been rejected. It has been insisted, that declarations of the testator were admissible in evidence to show that the will he had executed was not valid; but no case had been cited in support of such a position, and we shall not for the first time establish a doctrine which would render useless the precaution of making a will; for if such evidence were admissible, some witness would constantly be brought forward to set aside the most solemn instruments. Such a doctrine would be not only in the highest degree inconvenient, but contrary to the first principles of evidence, according to which the will itself is the best evidence which the nature of the case supplies. It has been urged, however, that the declarations are admissible as having been made by one under whom both of the contending parties claim, upon the same principle as the declarations of a common ancestor. Declarations of a common ancestor as to the state of his family, pedigree, and other matters peculiarly within his knowledge, are undoubtedly admissible in evidence; but they are wholly different from declarations tending to impeach the validity of a written instrument, which have never yet been received; and I am clearly of opinion were properly rejected in the present instance.

Then, with regard to the imputations on the character of Scott, the attesting witness who prepared the will; if the demandants had merely imputed to him an error in judgment, perhaps the evidence would not have been admissible; but if it were imputed to Scott that, having caused a will to be executed imperfectly, he had added an attesting witness after the death of the testator; — that in effect he had committed a forgery; — if his moral character were thus attacked, those who were interested in it had a right to defend it. A passage has been cited from Buller's *Nisi Prius*, and it has been contended that there is no distinction between the case of an attesting witness to a will, and the witnesses to bills, notes, and the like. But bills are usually instruments of a recent date, while wills are often undisputed till all the parties present at the execution of them have ceased to be in existence. The present writ of entry was sued out no less than twenty-seven years after the time of the transaction to which it relates. In such a case there is no way of protecting the character of a witness other than the admitting such evidence as has been here received. In many cases necessity forms the law. The necessity of admitting the evidence in this case is manifest, and the two decisions which have been

cited, one of them from no less an authority than Lord *Kenyon*, are clearly in point. I have repeatedly tendered such evidence myself in similar cases when at the bar. I have had it tendered on the other side, and have never objected; and the common practice of Westminster Hall has always been to receive it. That practice, perhaps, is better evidence of the law even than decided cases; and the Court, therefore, cannot grant the rule which has been prayed on the part of the demandants.

PARK, J. I am of the same opinion on both points. The evidence of declarations of the testator incompatible with the validity of the will, was properly rejected. When the legislature has taken such care to prevent frauds in wills, and when it is considered how easily declarations may be extorted by artful persons after the intellect of a testator has been impaired by time, it would be most mischievous, and a violation of all established principles, to allow such declarations to be received in evidence.

Then, the testimony to the character of Scott was properly admitted according to the general understanding and practice of Westminster Hall for many years, and according to decided cases.

BURROUGH, J., referred to a case tried before him recently at the Exeter assizes, *Doe, d. Teage, v. Wood*, where evidence of the same kind was admitted to establish the character of a deceased attesting witness to a will.

GASELEE, J., concurring with the rest of the Court, the rule was  
Refused.

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COE v. CLAY. — p. 440.

He who lets, agrees to give possession, and if he fails to do so, the lessee may recover damages against him, and is not driven to bring an ejectment.

THE defendant had agreed to let the plaintiff certain premises per verba de præsenti; and this was an action for not letting him into possession, which, a preceding occupier having wrongfully refused to quit, the defendant was unable to effect.

At the trial, before *Vaughan*, B., last Cambridge assizes, the agreement having been proved, it was objected on behalf of the defendant, that the plaintiff had shown no breach, for that the agreement amounting to an actual demise of the premises, the plaintiff had an interest upon which he might have brought an ejectment, and it was no default in the defendant, if a person not claiming under him committed a wrong for which the plaintiff had a distinct remedy by ejectment. Supposing the law to be otherwise, every one who made a new demise would be liable to damages if an obstinate tenant held over.

A verdict, however, having been found for the plaintiff,

*Peake*, Serjt., moved to set it aside on the grounds urged at the trial; but

The Court were all clearly of opinion, that he who lets, agrees to give possession, and not merely to give a chance of a lawsuit; and the breach assigned, being, that the defendant did not give the plaintiff possession, the rule was

Refused.

## DOE, dem. DIXON and Another v. WILLIS and Another.—p. 441.

Where commissioners, under an inclosure, made an allotment in respect of R.'s land in 1824, Held, that the allotment passed by a subsequent conveyance of the land in 1824, although the commissioners' award was not executed till 1827.

THE lessors of the plaintiff claimed the lands sought to be recovered in this ejectment under a conveyance from Rose, a former owner, in trust to sell and pay off, first, certain incumbrances, and then a debt due from Rose to the lessors of the plaintiff. The conveyance bore date November, 1824, and the lessors of the plaintiff had had an equitable mortgage of the premises during three years preceding. Early in 1824, the commissioners, under an inclosure act, had made Rose an allotment in respect of the premises, but their award was not executed till 1827.

The defendants claimed under elegits issued upon judgments entered up in November and December, 1824, subsequently to the conveyance. The action had been commenced early in that year.

At the trial before *Vaughan*, B., last Aylesbury assizes, it was contended on the part of the defendants, that the conveyance under which the lessors of the plaintiff claimed, was, under the statute of Elizabeth, fraudulent as against creditors, and that at all events the award of the commissioners under the inclosure not having been made till 1827, the allotment made by them to Rose did not pass under his conveyance to the lessors of the plaintiff.

The jury having found there was no fraud, and having given a verdict for the lessors of the plaintiff,

*Taddy*, Serjt., moved to set it aside on the grounds urged at the trial; but

*The Court*, after ascertaining from the learned Baron, that the question of fraud had been set at rest by the express finding of the jury, held that the allotment of the commissioners under the inclosure in respect of Rose's land, passed to the lessors of the plaintiff by the conveyance of the land, and the rule was

Refused.

## WITHINGTON v. HERRING and Others.—p. 442.

Defendants entered into an agreement with C. to carry on for them certain mining speculations in America,—furnished him with instructions,—a letter authorizing him to draw on them for 10,000*l.*,—and a power of attorney of the most extensive description, "to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might deem necessary for the purpose."

C., after he had raised 10,000*l.* under the letter of authority, obtained of plaintiff, in America, 1,500*l.*, which he applied to the defendant's use, and for the amount, drew bills on defendants, which he indorsed to plaintiff. He did not show the letter of authority to the plaintiff; there were no indorsements on it of sums previously raised,



and it did not appear that the plaintiff knew that any money had been raised before by C.; the defendants refused to accept the bills.

Held, that plaintiff was entitled to recover 1500*l.* from defendants, as money had and received to his use.

THE defendants, merchants in the city of London, being about to speculate in mining concerns, entered into the following agreement with Mr. John Crabtree, and then furnished him with the letter of instructions, the letter authorizing him to draw on them, and the power of attorney set forth in the following pages.

“Memorandum of agreement between Mr. John Crabtree and Messrs. Herring, Graham, and Powles.

“Messrs. Herring, Graham, and Powles, being desirous to enter into contracts for working such of the mines in Peru as may offer suitable encouragement for doing so, with the view of forming an association for the subsequent performance of such contracts, it is agreed that Mr. Crabtree shall proceed to Peru by the first Jamaica packet, to carry this object into effect, if he shall find it practicable and expedient to do so.

“Mr. Crabtree shall be furnished by Messrs. Herring, Graham, and Powles, with their power of attorney, authorizing him to enter into such proposed contracts on their behalf, which he engages to use in conformity with the instructions he may from time to time receive from them.

“Messrs. Herring, Graham, and Powles, shall defray all Mr. Crabtree's reasonable travelling expenses, and expenses of living during the continuance of this mission.

“Mr. Crabtree shall receive from Messrs. Herring, Graham, and Powles, for his remuneration, the sum of 1000*l.*, and if this mission shall occupy Mr. Crabtree more than a twelvemonth, from the date of his leaving London to embark in the packet, he shall receive at the rate of 1000*l.* per annum from the said date.

“Mr. Crabtree shall further receive one fifth share of the clear profits which Messrs. Herring, Graham, and Powles, may make by such contracts, or by forming the association to be founded on the contracts to be entered into by him.

“London, 1st January, 1825.

“HERRING, GRAHAM, and POWLES.

“JOHN CRABTREE.”

“London, January 7th, 1825.

“Dear Sir, — We have now to request your attention to the following instructions on the objects of your mission to Peru.

“On your arrival in Peru, your first care will necessarily be to ascertain whether the political condition of the country be so far settled as to render it prudent to undertake any extensive engagements there. We need say nothing as to the means of ascertaining this fundamental point; or the rules by which you should be governed in deciding it. You know the character of the people, and the nature of the country, and you will have the best channels of information open to you. We will only remark, that we should prefer measures being delayed so long as any serious doubts on this head may remain on your mind.

“Presuming this point satisfactorily settled, your next object will be to

make engagements in our name, and in our behalf, for working such of the mines as, on good information, you may learn to be the most promising. Among other considerations the following will deserve your attention ; viz., the proximity of the mines to water communication, so as to afford convenient means of transport for steam-engines and other machinery ; their being situated in a neighborhood where fuel for steam-engines and for smelting is to be found, and where laborers, acquainted with mining, are to be had ; and the salubrity of the situation, with a view to the employment of European miners.

“The way in which mines may be secured, are as follows, viz. : —

“First, by making contracts or leases with the government, for working such as may be government property. In this way we have engaged the Mariquita mines from the Colombian government. Copy of the lease or contract for two of which we enclose for your government. (No. 1.)

“Secondly, by making contracts with individuals who may be proprietors of mines, on the principle of undertaking to put the mines at work, giving the proprietors a certain portion of the net produce. This portion varies according to the quality and circumstances of the mines ; in some cases one third, in others half, and in others two thirds, being conceded to the owners. These terms apply more particularly to Mexico, which mines, being so much nearer to Europe, are necessarily much more desirable to English capitalists. We should think that in no case could any mine proprietor in Peru look for more than half the net proceeds of the mine. The term of such contracts should be twenty-one years. We enclose for your government (No. 2) the copy of a contract made in London, for working a mine in Mexico, the provisions of which are considered very fair on both sides. We should recommend your taking this contract as a model in any such engagements, it having been prepared by one of the most experienced miners in England.

“It is indispensable that we take the entire management of the mine ; and very much for the interest of the proprietors themselves that we should do so.

“The third way of securing mines is, by taking possession of such as may be liable to be denounced by having been abandoned by their former possessors. This is the most desirable way of obtaining mines, if practicable, the entire possession being thereby secured ; but some difficulty may arise, if it should happen (as is the case in some parts) that none but citizens can denounce mines. It will be so much the interest of the government to draw forth the resources of the country, that every practicable facility may reasonably be anticipated from them, and, perhaps, if the name of a citizen be necessary, that of General Miller (who is doubtless a naturalized citizen of Peru) may probably be made use of by making an arrangement with him for that purpose. Of all this you will be best able to judge on the spot. There is one consideration, however, we should wish you to bear in mind, on the subject of abandoned mines, and that is, that where they have only been suspended working by the temporary difficulties of the proprietors, occasioned by the struggle for the establishment of independence, we should by no means wish to deprive such persons of the possession of their property. We would much rather purchase their rights, either by money or by an annual allowance, than take advantage of their misfortunes ; but where mines appear to be wholly deserted by their former proprietors, without hope of

their being able to resume the working them, and, consequently, are liable to be denounced by any person possessing competent means for working them, we see no objection to your taking measures for gaining possession of such mines, if practicable.

"We need hardly suggest to you, that, in whatever manner you may obtain mines, whether by lease or contract, or possession, it will be very important to see a clear legal title established, that we may be going on a secure foundation in this respect.

"As to the locality of mines, it is important to keep in view that the more you can meet with (if good) in one district, the better, for the greater convenience of management.

"As it may be important to make advances to some of the mine proprietors on the execution of the contracts with them, we enclose (No. 3) a letter of credit, authorizing you to draw on us for 10,000*l.*, or 50,000 dollars, to be applied to this or the other purposes of this undertaking.

"If you succeed in making the proposed engagements for mines, you will please have them executed in four parts, and send three to us by different opportunities; the first by Mr. Miller, who accompanies you, and who will in that case return with all possible despatch, and the other two by the quickest and safest occasions you can find.

"You will at the same time forward to us the fullest details regarding the mines you may engage, derived from persons practically conversant with the subject, so as to enable us to judge of the description of machinery and other assistance necessary to be despatched from this country, which will be immediately forwarded.

"For the purpose of enabling you to carry these instructions into effect, we enclose you our power of attorney, (No 4.)

"We remain, &c.

"J. Crabtree, Esq."

"HERRING, GRAHAM, and POWLES."

(No. 3.)

"London, January 7, 1825.

"Dear Sir, — We hereby authorize you to draw upon us for the sum of 10,000*l.* sterling, or 50,000 Spanish dollars, and we undertake to honor your drafts accordingly. "We are, &c.

"To J. Crabtree, Esq."

"HERRING, GRAHAM, and POWLES."

(No. 4.)

"To all persons to whom these presents shall come, We, Charles Herring, William Graham, and John D. Powles, of the city of London, merchants, send greeting: Whereas we contemplate entering into certain undertakings within the empire, states, territories, dominions, and dependencies of Peru, in South America, and for carrying the same into effect, we have agreed with John Crabtree, of the city of London, Gent., that he shall proceed to Peru with such powers as are hereinafter delegated to him, Now know ye, and these presents witness, that we, the said Charles Herring, William Graham, and J. D. Powles, have, and each and every of us hath made, ordained, nominated, constituted, and appointed, and in our and each of our place and stead put and deputed, and by these presents do, and each and every of us do make, ordain, nominate, constitute, and appoint, and in our and each of our place and stead, put and depute, and by these presents do and each and every of us doth make, ordain, nominate, constitute, and appoint, the said John Crabtree to be our and

each of our true and lawful attorney for us and each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, complete, and execute, ull such negotiations, proposals, contracts, engagements, or agreements, which our said attorney shall, in relation to the said proposals, undertakings, or any of them, deem it expedient or proper to enter into, transact, complete, and execute, with the government, or governments, for the time being, of the said empire, states, territories, and dominions of Peru, and their dependencies in South America, or any of the ministers, officers, branches, or departments thereof respectively; or with any public or private companies, or other persons entitled to, interested in, or having the care, superintendence, management, government, agency, control, or direction of or over any mine or mines, vein or veins of ore whatsoever, situate and being, or which may hereafter be found or discovered, or be denounced within any part or parts of the aforesaid empire, states, territories, or dominions, and their respective dependencies, for the purpose of obtaining a grant, demise, or lease of any such mines or veins, or of any lands or grounds over or adjoining the same, or for the purchase of any ore or ores, or of the right to open, dig, or work, any mine or mines, or to smelt and refine the ores thereof, or any other ores, or otherwise touching or concerning the management, conduct, or carrying on of the works of any such mines, or any other works or undertakings, or in, about, or relating to the same, or to the smelting and refining of the ores thereof, or any other ores, and for the purposes and objects aforesaid, or any of them, or in relation thereto, and to the completion thereof, for us and each of us, and in our and each or either of our names, and as our and each of our acts and deeds, or in the name of our said attorney, to enter into, make, sign, seal, execute, and deliver, such deeds, conveyances, leases, grants, covenants, petitions, memorials, and other instruments, acts, and writings whatsoever, as in the judgment or opinion of our said attorney shall appear requisite or expedient, and also for the purposes and objects aforesaid, or any of them, or in relation or incidental thereto, or to any of them, to take to himself, hire, engage, or employ, all such engineers, surveyors, agents, collectors, clerks, artificers, artisans, workmen, and other persons, and at such salaries and rate of compensation, or recompense, as our said attorney shall in his discretion think requisite, proper, or expedient; and also for him, our said attorney, to conduct, manage, superintend, and carry on, and purchase all needful and necessary tools, implements, and materials, and erect and establish all proper and needful buildings, and other works, for the conducting and carrying on in a beneficial manner the works of any such mines, and the smelting and refining of any such ore or ores through all the different processes and branches thereof, in such a manner in all respects as our said attorney shall think advisable and expedient for our benefit and advantage; and also for him, our said attorney, from time to time to contract to sell, and absolutely to sell and dispose of the produce and proceeds of any such mines or ores, or any part thereof, or barter, or exchange and deliver the same for, or in lieu of, any goods, wares, or merchandise, the produce of Peru, or otherwise, as to our said attorney shall seem meet, or convenient, or expedient, and also, in the discretion of our said attorney, to transmit to England to us, or on our account, all or any part of the proceeds or produce of any such mines or ores, or of the goods, wares, or merchandise received, or taken by way of barter or

exchange, as aforesaid, or else to sell or dispose of any such goods, wares, or merchandise so received, or taken in exchange aforesaid, and also to ask, demand, sue for, recover, and receive of and from all and every person and persons whomsoever, liable, interested, or compellable in that behalf, all debts, sums of money, bonds, bills, notes, securities for money, goods, chattels, or effects, which, in the prosecution of the said undertakings, or any of them, or in relation to the purposes and objects aforesaid, or arising out of the same, shall become due, owing, payable, or deliverable, or of right shall belong to us, or any or either of us, and upon receipt or delivery thereof respectively, or of any part thereof, to make, sign, seal, and execute, and deliver good and sufficient receipts, releases, acquittances, and other discharges for the same; and also, if necessary, to compound any debts, sums of money, claims, and demands so due and owing, or to become due and owing to us, or any or either of us, and to take less than the whole in full for the same, and to extend the time of payment thereof, or the delivery of any goods or effects, and to accept security for the same respectively, or any part thereof; and also to adjust, settle, and allow, or to disallow any accounts which may subsist between us or any other person or persons, or between our said attorney or any other person or persons in respect, or any way relating to such mines or ores, or the working, smelting, or refining thereof, or the proceeds or produce thereof, or to any goods or effects bartered, sold, or exchanged as aforesaid, or to any of the purposes or objects aforesaid, or to any other matter, cause, or thing relating thereto, or arising out of the same respectively, wherein we may be in any manner interested or concerned; and for all or any of the purposes or objects aforesaid, or relating thereto, for us and in our and each and either of our names or name, and as our and each of our act and deed, or in the name of our said attorney, to sign, seal, execute, and deliver, any deed of composition or release, or other deeds, bonds of arbitration, or other bonds, agreements, instruments, assignments, assurances, and other acts whatsoever, as there may be occasion, in the judgment or opinion of our said attorney; and, accordingly, to perform and carry into full effect any covenant, engagement, or liability, in such deeds or other instruments or assurances to be contained on our parts or behalves, or on the part of our said attorney; and also in manner aforesaid, or otherwise, to commence, sue forth, and prosecute any action, suits, processes, or other proceedings whatsoever, according to the laws of the country, which it may be necessary or expedient, in the judgment or opinion of our said attorney to commence, sue forth, and prosecute in and about, and for the purpose of carrying into effect, all, or any of the purposes or objects hereinbefore mentioned, and the powers and authorities herein contained; and if he shall think it proper or expedient to discontinue, or become nonsuit, in any such action, suits, or proceedings; and also to defend any action, suits, and proceedings, which may be instituted against us, any, or either of us, or against our said attorney, on our, any, or either of our accounts, in relation to the premises, and for, or about, or respecting any of the purposes or objects aforesaid, to appear in or before any courts, tribunals, judges, ministers, or officers whatsoever, when, and as there may be occasion, and there to make such protests, appeals, and declarations, and to take, adopt, and pursue all such other proceedings as our interest may from time to time require, and as to our said attorney shall seem requisite and expedient,

and generally for the purposes aforesaid, or any of them, or otherwise in relation to the premises, to transmit, negotiate, manage, execute, and perform all such acts, deeds, matters, and things whatsoever, as to our said attorney shall, in his judgment and opinion, seem meet or expedient to be done or performed, in and about all and singular the premises aforesaid ; and that as fully, extensively, and effectually in all respects, and to all intents and purposes whatsoever, as we ourselves could do, perform, or act in the same, if we were personally present and acting therein ; and we do hereby give and grant unto our said attorney full power and authority from time to time to nominate, substitute, and appoint one or more attorney or attorneys under him, to act in and about all or any of the purposes or objects, and such substituted attorney or attorneys at pleasure to dismiss from time to time, and notwithstanding the substitution of any other attorney or attorneys as aforesaid, to exercise and perform all or any of the powers and authorities hereinbefore expressed and contained, and given to him ; and we do hereby give and grant unto our said attorney, and his substitute and substitutes to be appointed from time to time, our full and whole power and authority over the premises ; and we do hereby promise and agree to ratify and confirm, and allow all and whatsoever our said attorney and such substitute or substitutes shall lawfully do or cause to be done in and about the premises, under and by virtue of these presents. In witness whereof we have hereunto set our hands and seals at London, the 8th day of January, 1825.

“ CHARLES HERRING.

“ WILLIAM GRAHAM.

“ WILLIAM D. POWLES.”

Crabtree, after he had raised more than 10,000*l.* under this power, obtained from the plaintiff in Peru, among other sums, 1500*l.*, which he applied to the defendants' use, and drew bills on the defendants for the amount.

These bills the defendants did not accept or pay ; whereupon the plaintiff, considering the drawing of them by the agent to be equivalent to an acceptance by the defendants, brought an action to recover the amount, and declared on the bills, adding counts for money paid, money had and received, and on an account stated.

At the trial, before *Best*, C. J., Guildhall sittings, after Michaelmas term, Crabtree stated that he did not show the letter of credit to the plaintiff ; that there were no indorsements on it of sums advanced by others, but he could not say that the plaintiff was acquainted with that fact ; that he could not state whether he had shown the plaintiff the power of attorney or not ; but that it lay separate from the other instruments in order to be shown to any who might require to see it.

The jury gave a verdict for the plaintiff, and found specially,

1. That it was the duty of the plaintiff to call for the power of attorney and letter of credit.

2. That there was no evidence whether he had done so or not ; and,

3. That there was no evidence of his having been informed that money had been advanced by others under the letter of credit.

*Wilde*, Serjt., obtained a rule nisi to set aside this verdict, on the ground that the power given to Crabtree did not authorize him to raise a sum beyond the 10,000*l.*, mentioned in the letter of credit, or for any purpose but obtaining the lease of mines.

*Taddy*, Serjt., (*Russell*, Serjt., was with him,) who showed cause, contended, first, that by the agreement for a fifth part of the profits between Crabtree and the defendants, Crabtree became their partner, and, so, competent to engage them to any extent: and, secondly, that even if this were not so, the power given to him was, notwithstanding the letter of credit, sufficiently ample to enable him to raise money for any purpose, and to any extent.

On the first head, he admitted that a clerk might be paid by a percentage on profits, without becoming a partner; but here Crabtree was to have a specific salary as clerk, (1000*l.* a year,) and to have one fifth of the profits besides, which clearly made him a partner. *Waugh v. Carver*, 2 H. B. 247; *Hesketh v. Blanchard*, 4 East, 144. But on the second, he contended that a more ample power could not be given, and that Crabtree was not confined to the hiring of mines, but was authorized to purchase; and if so, to raise money to the necessary extent, as amply as his principals themselves could have done.

*Russell* was stopped by the Court.

*Wilde* and *Stephen*, Serjts., in support of the rule, rested their case on the following positions:—

1st. Where a power is accompanied by other instruments, the extent of the power must be collected from all the instruments taken together, and not from any one separately.

2d. General expressions in a power are limited and restrained by the nature of the particular object of the power. *Attwood v. Munnings*, 7 B. & C. 278; *Hogg v. Snaith*, 1 Taunt. 347; *Hay v. Goldsmidt*, 1 Taunt. 349.

3d. Taking the agreement, the instructions, the letter of credit, and the power, in this case, together, it is plain that Crabtree had only authority to raise money for taking mines under a lease, (not for purchasing them,) and to the extent of no more than 10,000*l.* The words *instrument* and *grant* must be construed with reference to the expressions with which they are accompanied: *noscuntur a sociis*; and the object of the whole is shown by the words *demise* or *lease*. For the purpose of obtaining leases, there could be no necessity for raising a larger sum than 10,000*l.*

4th. It is the business of every one who deals with an agent, to satisfy himself of the nature and extent of the agent's authority before he deals.

5th. If the plaintiff saw those authorities, his claim is defeated by the third proposition. If he might have seen them, and did not, he must suffer for his own neglect.

*Shirriff v. Wilkes*, 1 East, 48; *Saville v. Robertson*, 4 T. R. 720; and *Young v. Hunter*, 4 Taunt. 582, were cited to show that Crabtree did not become a partner with the defendants by undertaking the conduct of the adventure under a stipulation to receive a portion of the profits. That was only intended as an addition to his salary as agent. It would occasion great alarm in the commercial world if an agent with a limited authority were enabled to raise money to any extent, under the mere verbiage of a conveyancing power.

BEST, C. J. It is not necessary to decide in this case whether Crabtree was a partner with the defendants or not, as it seems to us that he was clearly their agent in this transaction. There is no ground for the alarm which it is supposed will be felt by the commercial world, for

this was not a commercial transaction; and I might, perhaps, have forborne to leave the matter to the jury in the way in which it was left. But the jury have found that it is the duty of a party, advancing money to an agent, to look at his power of attorney and letter of credit; negating, thereby, the necessity of calling for his letter of instructions; and properly, too, because the agent's letter of instructions may contain communications which it may be neither safe nor convenient to divulge. If, therefore, the power of attorney and letter of credit did not constitute a sufficient authority for what Crabtree has done, the plaintiff is not entitled to recover. I am of opinion, connecting these two documents with the fact that the plaintiff had no notice of other advances having been made, that Crabtree had sufficient authority to take up the money in question. I agree that an authority of this kind is to be taken strictly; and is not, by mere general words, to be extended beyond the particular object in view. But it is impossible to doubt that these two instruments do confer authority on Crabtree to raise money in order to carry into effect the object of his employers. It would be lamentable if a foreigner, who had advanced money on the faith of such instruments, should be told he ought to have sent to England for the opinion of an English conveyancer, when, upon the face of the instrument, a plain understanding could entertain no doubt. The language is as extensive as the empires with which the defendants propose to have transactions:—

“Each and every of us do make, ordain, nominate, constitute, and appoint the said John Crabtree to be our and each of our true and lawful attorney for us and each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, *complete*, and execute all such negotiations, proposals, contracts, engagements, or agreements which our said attorney shall, in relation to the said proposals, undertakings, or any of them, deem it expedient or proper to enter into, transact, complete, and execute with the government or governments for the time being of the said empire, states, territories, and dominions of Peru, and their dependencies in South America, or any of the ministers, officers, branches, or departments thereof respectively, or with any public or private companies, or other persons entitled to, interested in, or having the care, superintendence, management, government, agency, control, or direction of or over any mine or mines, vein or veins of ore whatsoever, situate and being, or which may hereafter be found or discovered, or be denounced within any part or parts of the aforesaid empire, states, territories, or dominions, and their respective dependencies, for the purpose of obtaining a grant, demise, or lease of any such mines or veins, or of any lands or grounds over or adjoining the same, or for the *purchase* of any ore or ores, or of *the right to open, dig, or work any mine or mines.*”

It has been urged that the meaning of the word *grant* must be collected from those with which it is accompanied, and is not to be extended beyond a lease. But how is a foreigner to make such a distinction? Looking at the instrument, however, with the eye of an English conveyancer, I should say that, taking the whole together, the word *grant* implies a conveyance upon absolute purchase as well as upon demise; and if Crabtree were authorized to purchase, he was impliedly authorized to raise money to effect his purchase.

But then, it is said, he was restricted by the letter of credit.



In Beawes's *Lex Mercatoria* there is a form of a letter of credit; and if the defendants had pursued that, no difficulty could have arisen. According to that writer, a letter of credit is addressed to A., B., or C., to advance the agent so much. The instrument executed by the defendants, in this case, can scarcely be called a letter of credit; it is addressed to the agent himself; and if a man is foolish enough to sign such an instrument, he authorizes any one who does not know that money has already been raised, to advance 10,000*l.* to the holder. The jury here have found that there is no evidence of the plaintiff's having been made acquainted with the fact that money had before been raised on the letter of credit, and it is for the persons who execute such instruments to show that fraud has been practised against them, and not to call on the other party to enter upon proof of circumstances to which he may be an entire stranger. Our decision will produce no ill effect on commercial credit; it will tend to protect the inhabitants of other countries, and will compel merchants to send out none but honest agents.

PARK, J. Powers of attorney must undoubtedly be construed strictly; and I agree in all that was said by the Court in *Attwood v. Munnings*, for it confirms the judgment we are now pronouncing. There, an agent having accepted a bill, *Holroyd, J.*, said, "The powers in question did not authorize this acceptance: the word *procuration* gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given."

The agent there had authority to indorse, and to accept bills drawn by agents or correspondents on the defendant; and the Court held a power to indorse exclusive of a power to accept, and a power to accept bills drawn by agents exclusive of a power to accept bills drawn by a partner. But *Holroyd, J.*, proceeds, — "As to the general powers; — these instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect." Taking that doctrine as correct, would any plain man, reading this power of attorney, suppose it did not confer on the attorney ample authority to do every act necessary to the acquiring property for his principals? If drawing bills was necessary, common sense says he had power to draw them for the purposes which he was intrusted to effect. He is to "enter into, transact, *complete*, and execute all such negotiations, proposals, contracts, engagements, or agreements which he may deem it expedient to enter into for the purpose of obtaining a grant, demise, or lease of any mine, or for the *purchase* of any ore, or *of the right to dig or work any mine.*" How is he to complete any such engagements without paying? And how can it be said he is not authorized to purchase as well as to take on lease the right to work any mine? And by the general words at the end, he is to do all this "as fully, extensively, and effectually, in all respects and to all intents and purposes whatsoever, as we ourselves could do, perform, or act in the same, if we were personally present and acting therein." It would be most mischievous if a man were to be sent forth with such a power, and his principal, when it had been acted on, were to be permitted to say that such expressions were mere verbiage.

BURROUGH, J. The power given by the defendants to Crabtree was clearly sufficient to authorize him to raise money for the defendants' use. Without such a power the enterprise might have failed. It is unneces-

sary, therefore, to decide on the question of partnership, and the rule must be discharged.

GASELEE, J. Supposing this not to be a partnership, I have difficulties on the other part of the case; but I agree with the rest of the Court in the propriety of not disturbing the verdict. Crabtree said, the power lay separate for the purpose of inspection. I presume that persons in the situation of the plaintiff would look at the power before they advanced money, and it would be prejudicial to mercantile interests to restrain a power where the object in view requires an extensive authority. As to the inquiries which it is alleged that the plaintiff ought to have made touching any sums advanced upon the letter of credit, it would have been useless to make them of Crabtree, who of course would not disclose any thing to defeat his own purpose; and impossible to make them with success elsewhere, as, for aught that could be learned in the absence of indorsements, Crabtree might have raised the money before he reached America.

Rule discharged.

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BRITTEN and Others v. HUGHES. — p. 460.

Plaintiff, holding two bills drawn by the defendant, one for 400*l.*, the other for 156*l.* 19*s.* 10*d.*, executed a composition-deed, containing a general release of the defendant, and a schedule of the sums due to various creditors who executed the deed. After the plaintiff's name was put the sum of 156*l.* 19*s.* 10*d.* only, at the request of the defendant, who expected the plaintiff would recover the bill for 400*l.* by suing the acceptor. The other creditors were not made acquainted with the fact, that the plaintiff had a debt of 400*l.* as well as 156*l.* 19*s.* 10*d.*:

Heid, he could not afterwards sue defendant on the bill for 400*l.*

*Gaselee, J.*, dissentiente.

ASSUMPSIT on a bill of exchange for 400*l.*, drawn and indorsed by the defendant to Sard and Smither, who having discounted it for him, indorsed it to the plaintiffs. The bill was due May 4, 1826.

At the trial, before *Best, C. J.*, London sittings after Michaelmas term, it appeared that, on the 10th May, 1826, the plaintiffs, who were also the holders of another bill, drawn by the defendant for 156*l.* 19*s.* 10*d.*, executed, in conjunction with other creditors of the defendant, a release of "all and all manner of action and actions, suit and suits, cause and causes of action and suit, accounts, reckonings, bills, notes, sum and sums of money, and security for money, controversies, damages, claims, and demands whatsoever, which we, the said several creditors of the said Henry Hughes, or any or either of us ever had or now have, or which we or any or either of us, or any or either of our respective heirs, executors, administrators, or assigns, can, shall, or may have, sue for, claim, challenge, or demand of, from, or against the said Henry Hughes, for or on account of any debt, claim, or demand of us, or any or either of us, in respect of any security, account, or reckoning now standing and being between us or any or either of us, or any part or parts thereof with or against the said Henry Hughes, as, for, or on account of any other matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents."

Names of Creditors.	Amount of Debts.	L. S.	Amount of Composition.
Britten, Wilson, } and Meek, }	£ s. d. 156 19 10		£ s. d. 78 9 11

The defendant relied on this deed as an answer to the action, and *Wilde*, Serjt., cited *Holmer v. Viner*, 1 Esp. 131, to show that a party who signs a composition-deed cannot, by splitting his demand, compound for a part only of his claim, and by reserving himself as to the residue, obtain a greater proportion of his debt than other creditors.

The plaintiffs relied on *Payler v. Homersham*, 4 M & S. 422, in which it was ruled on demurrer, that a party may plead that a composition has been executed for a part of his debt only; and they called a witness who proved an admission on the part of the defendant, that the 400*l.* bill had not been included in the release, because the defendant expected that the acceptor would pay the bill, and the plaintiffs, looking to him, abstained from taking composition-notes from the defendant for the amount, which they had taken in respect for the bill for 156*l.* 19*s.* 10*d.*

The learned Chief Justice directed a nonsuit on the authority of *Holmer v. Viner*, and on the ground that it was a violation of the principle of a composition-deed, and legally a fraud on the other creditors, if they were induced to believe that a party was engaging to receive a composition upon the whole of his claim, when, in fact, he was receiving it only on a part.

*Taddy*, Serjt., having obtained a rule nisi to set aside this nonsuit.

*Wilde*, Serjt., who showed cause, relied on *Holmer v. Viner*, as in point, and as concurring in principle with *Jackson v. Lomas*, 4 T. R. 166; *Leicester v. Rose*, 4 East, 372; *Cecil v. Plaistow*, 1 Anstr. 202; *Harrhy v. Wall*, 1 B. & A. 103.

*Payler v. Homersham* only decided, that an averment that a given debt was intended to be excluded from the operation of the release, was sufficient on demurrer; but such an averment was compatible with proof that all the creditors were made acquainted with the intention to exclude the debt, and if that had been shown here, there would have been no objection to the plaintiff's claim. The objection was, that for aught that appeared on the face of the composition-deed, the creditors, generally, were misled in supposing that the plaintiffs had compounded for their whole demand, when, in fact, as to a large proportion of it, they were reserving their entire claim.

*Taddy* and *Jones*, Serjt., supported the rule. *Payler v. Homersham* is in point for the plaintiffs, and the other cases do not apply to the circumstances of the present; for in them, either there was fraud, or the creditors had contracted to compound for the whole of their debts expressly. Here there was no fraud, and the very object of the plaintiffs in putting the sum 156*l.* 19*s.* 10*d.* opposite their names, was to show what they had compounded for, and what not. So that the general terms of the release were restricted, as they might be, to the extent particularly specified.

In *Cecil v. Plaistow* there was a general release without restriction, and the interests of a feme covert were involved; *Harrhy v. Wall* was a case of manifest fraud, and the party never specified for what amount he signed. (2 Stark. N. P. C. 195.) In *Leicester v. Rose* the agreement was express

for a composition of the whole debt; and even in *Holmer v. Viner* the insolvent had assigned all his effects for the benefit of his creditors, so that it might be reasonably presumed that they agreed to compound for the whole of their debts. But *Payler v. Homersham* has decided that a party may compound for a part only; that decision was acted on by *Best, C. J.*, at Guildhall, May 1st, 1828, in *Fennell and Others v. Day*, the circumstances of which case did not differ from the present; and if a party may so compound, there can be no fairer way of doing so than by specifying in the deed, as here, the amount of debt compounded for. The course of pleading would be a test. If the present demand had been on a bond instead of a bill, the defendant must have pleaded payment, accord and satisfaction, or release; payment or accord are out of the question; and a release of 156*l.* 19*s.* 10*d.* could not have been given in evidence as a release of 400*l.* As to legal fraud, there was none as against the defendant, for it was at his request, and for his benefit, that the 400*l.* bill was not included in the deed; none as against the creditors, the debtor's property not being affected by the transaction.

The analogy between creditors coming in under a commission of bankrupt, and under a composition, is very close; and the creditors of a bankrupt are allowed to prove for one debt, and proceed at law for another. *Harley v. Greenwood*, 5 B. & A. 95. The present case is of that nature, and entirely distinguishable from any that have preceded it on the subject of debts claimed after a composition, in which the creditor has either obtained, first, a new security; or, secondly, an advantage by payment or security for the identical demand; or, thirdly, there has been an assignment of all the debtor's property; or, fourthly, a splitting of one entire demand. The demand now made is on an instrument unconnected with that for which the composition was accepted.

*BEST, C. J.* I continue of the same opinion as at the time of that trial, and I am confirmed in it by adverting to the terms of the composition-deed. I am not embarrassed by my own decision in *Fennell v. Day*, because if I were wrong then, that would be no reason, as Lord *Kenyon* said upon a similar occasion, for my continuing to be wrong now; however, the question now before the Court was not raised in that case. I only decided there, on the authority of *Payler v. Homersham*, that a debtor may, where the other creditors are not kept in ignorance of the fact, make a composition for a portion of his debts, and that general terms in a deed may be restrained by particular terms in the same instrument. But I put this case on the ground of fraud: I do not mean moral fraud, but fraud in law; and a practice of this sort has a great tendency to encourage moral fraud. The nonsuit, therefore, was right on the authority of decided cases; for *Holmer v. Viner* is in point, and is not a mere *nisi prius* decision, because an application was afterwards made in *banc* to set aside the nonsuit, and a rule was refused. In that case the plaintiff, who had two demands, having signed the composition-deed as to one of them only, Lord *Kenyon* said, that he could not so split his demand; and no decision has been cited at variance with that. *Leicester v. Rose* has decided, that taking a different security is a fraud on the other creditors, because they no longer stand on the same footing; and *Cecil v. Plaistow* was determined on the principle which we now adopt, that it is a fraud on the other creditors to sign the composition-deed for a portion only of the party's demand, unless the other creditors are aware of the fact.

But without the authority of cases, the principle is clear, that upon a composition-deed, all the parties are supposed to stand in the same situation,

and if there is any one of them who refuses to do so, he must announce it at the time. The plaintiff here says he will take 10*s.* in the pound; the others probably esteem it useless to stand out after that; and if they suppose the plaintiff signs for the whole of his demand when such is not the fact, they are not in a condition to form a correct judgment on the subject. Independently, therefore, of the terms of this deed, if we decided in favor of the plaintiff's claim, we should establish a rule that would lead to great fraud in the execution of composition-deeds. There is not the analogy which has been supposed between bankruptcy and compounding with creditors. In bankruptcy there is no concert or understanding between the creditors; the petitioning creditor acts on his own responsibility, and the other creditors are not influenced by any reliance on his judgment. The only question here, therefore, is, Whether, upon the terms of this deed, the other creditors were led to suppose that the plaintiff had compounded for all his demands. Now, if every other creditor had the same mental reservation as the plaintiff, of what use would such a deed of composition be to the debtor? The deed specifies, "all and all manner of claims and demands which we, or any or either of us, may have, sue for, claim, challenge, or demand of, from, or against the said Henry Hughes, for or on account of any debt, claim, or demand of us, or any or either of us, in respect of any security, account, or reckoning now standing or being between us, or any or either of us, with or against the said Henry Hughes." — Does not that mean, all the debts of all the creditors who signed the deed? It is impossible to say that it does not; and the use of the schedule is, not to enable, but to prevent the plaintiff from bringing forward at a future time other claims besides those specified in the deed. If such a reservation could be made with the consent of the debtor, it would be a fraud on the other creditors, as calculated to mislead their judgment; if without the consent of the debtor, it would be a fraud against him also. Language more operative than that employed in this deed, to release every kind of debt, could not have been employed. But the main ground on which we decide, is, that if reservations like this be allowed, no man again will agree to a deed of composition. Such transactions are necessarily uberrimæ fidei, and no engagement can stand which has been withheld from the knowledge of the whole body of the creditors, and which it would have been material for them to know.

PARK, J. I am of the same opinion, and have never entertained any doubt on the point; indeed, if the facts had been understood, I doubt whether the rule nisi would have been granted. Courts of law are never better employed than in supporting the rules of morality; and, in *Jackson v. Duchaire*, 3 T. R. 551, Lord Kenyon was clearly of opinion that the plaintiff was not entitled to recover, upon the ground that the private agreement between the plaintiff and defendant was a fraud upon a third person, who had paid a less sum in advancement of the defendant, in confidence that the sum so paid by him was the whole consideration due to the plaintiff. From that time to the present the decisions have all coincided, and if we were to put on this deed the construction contended for, we should be adopting all the frippery instead of the substance of special pleading; for the object of this deed is express, that the defendant should go clear of his debts; and though, perhaps, there might have been an understanding with the plaintiff, to support it would lead to infinite fraud, and open the floodgates of misery on poor debtors.

BURROUGH, J. I think the nonsuit was perfectly right. We should be very strict in the construction of deeds of this kind, which are executed on the supposition of the creditors all standing on the same footing. The creditors here all meant to release the defendant, and the very exception specified in the deed shows that no other exception ought to be implied. There is nothing in the deed to narrow the construction of the general terms; the defendant was to be made a free man; and the deed given in evidence is conclusive against the plaintiffs.

GASELEE, J. Although I do not concur in the decision pronounced by the Court, I am not sorry for the conclusion at which they have arrived, because the rule they have laid down is sound and beneficial, and likely to prevent fraud in compositions; and if this question had now been raised for the first time, I should have concurred with them; but I doubt whether the conclusion they have come to is warranted by previous authorities. *Holmer v. Viner* is undoubtedly like the present case; but there the defendant had given up all his property, which the present defendant has not done, nor even given security for the whole amount of the sum to be paid under the composition. In *Leicester v. Rose* there was a private stipulation that the plaintiff should have collateral security for the whole of his demand, which was a fraud on the debtor himself. All the other cases are distinguishable from the present, except *Payler v. Homersham*, which appears to me directly in point, and to be overruled by the present decision. There a release contained in a deed, (which recited that defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take of the defendant 15s. in the pound upon the whole of their respective debts,) whereby the creditors, in consideration of the said 15s. in the pound paid to them before executing the release, "each and every of them did release defendant from all manner of actions, debts, claims, and demands, in law and equity, which they or any or either had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of release," was held to release nothing but the respective debts set opposite the creditors' names, and all actions and demands touching them. And the broad principle laid down was, that the general words in a deed of release have reference to the particular recital, and shall be governed by it. This deed, by the list attached, clearly specifies the debts to which it was intended to be applied; and the words of general release in *Payler v. Homersham* are not more extensive than those employed here.

Rule discharged.

## DOE, dem. EDWARD SOUTHOUSE, Clerk, v. JENKINS and Another. — p. 469.

1. Where, by a very obscure and illiterate will, property was left to devisor's four grandsons, "and to the heirs males of the said grandsons, and then to the grandsons' heirs males that part that belonged to their father, and then to the last liver to the heirs males of the said grandsons, and for want of issues males of the grandsons," over; the Court implied cross-remainders.
2. The heir in tail received for ten years' rent under a lease for ninety-nine years granted by his ancestor: Held, a confirmation of the lease.

THIS was an action of ejectment brought to recover two undivided third parts of certain messuages, vaults, yards, and premises in Southouse Court, otherwise Edward's Court, in the parish of St. Martin in the Fields, in the county of Middlesex.

The cause came on to be tried before *Burrough, J.*, at the sittings at Westminster after Trinity term, 1828, when a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court upon the following case: —

Henry Southouse being seised in fee (inter alia) of the freehold part of a messuage in the Strand, in the county of Middlesex, then called the Sun Tavern, (whereof the messuages and premises in question, or the land on which the same were situate, were at that time parcel,) by his last will and testament, bearing date the 3d day of November, 1743, and properly executed and attested so as to pass real estates, after devising to his son Thomas Southouse certain lands and tenements not in question in this cause, proceeded to devise as follows: "I give and devise to my son Thomas Southouse, lately in the possession of Watkin, or Mrs. May, now Mrs. Hayes, the Sun Tavern, in the Strand, in the parish of St. Martin in the Fields, in the county of Middlesex, for and during his natural life. I do give and devise to my said son Thomas Southouse all those two farms, &c., at Ravensdon in Bedfordshire, for and during his natural life. But whosoever shall be in possession of the said lands at Ravensdon, and all the aforesaid premises so given by me to my said son Thomas Southouse, I charge on it a rent or an annuity of 40*l.* per annum to be paid to my daughter Ann Pellatt, for and during her natural life, and an annuity of 40*l.* per annum to be paid to my daughter Elizabeth Parker, for and during her natural life." And in another part of the said will as follows: "And from and after the decease of the said Thomas Southouse, I give and devise the said farms at Ravensdon, &c., and my houses in the occupation of the late Watkins and Mrs. May, now Mrs. Hayes, to the first son of the body of the said Thomas Southouse, lawfully begotten, and his heirs male of the body of such first son lawfully issuing, and for default of such issue, to the second, third, and fourth, and all and every other the son and sons of the body of my said son Thomas Southouse, severally and successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and the several heirs male of the body and bodies of all and every such son and sons, fully issuing, the elder of such sons and the heirs male of his body issuing being always preferred, and to take before the younger of such sons and the heirs male of his and their body and bodies issuing. I give and devise part of the said messuage and premises unto my son Samuel Southouse for his life, and to his heirs males of his body, after the decease of

my son Thomas Southouse and his heirs males, viz., my farms at Upminster, &c., and the Sun Tavern, late Mrs. Hayes, in the Strand, in St. Martin's in the Fields; and for want of issue males of my son Thomas and my son Samuel Southouse, after their decease I give the aforesaid farm at Upminster, &c., and the Sun Tavern, I give and devise them to my son Edward's four sons, to Henry Southouse, to Edward Southouse, to Thomas Southouse, and to William Southouse, my four grandsons. And I do further give to my four grandsons as above, after the decease of my son Thomas Southouse and his heirs males, all my farms, &c., at Ravensdon, in Bedfordshire. And I do hereby order to be paid out of the premises as is before given to my son Samuel Southouse and his heirs males, and also my four above grandsons, out of their premises, in proportion to the value of the several rents, to pay certain annuities mentioned in the will; and then after the decease of my son Thomas Southouse, and his heirs males, and after the decease of my son Samuel Southouse, and his heirs males, then I give all the above said farms, and premises, and messuages, to my above-said four grandsons, they to have share and share all alike of all the aforesaid premises. And then I give to the heirs males of all my said grandsons, and then to go to my grandsons heirs males, that part that belonged to their father, and then to them, and then to the last liver to their heirs males of my said grandsons; and for want of issues males of my grandsons, I give my grandson Henry Southouse, son of my son Henry Southouse, and to his heirs males of his body lawfully to be begotten. And for default of such issue male, to my nephew William Southouse, and his heirs males, and to my grandson Edward Parker, his heirs males, and for want of such issue male, I will that the same remain to my own right heirs forever."

The said testator, from the time of making his said will until and at the time of his decease, remained seised as aforesaid of the said freehold part of the Sun Tavern, and died in or about March, 1744, being survived by his said sons Thomas and Samuel, and by his four grandsons Henry, Edward, Thomas, and William.

In or about the year 1779, Thomas, one of the said four grandsons of the testator, died, leaving no issue male.

In or about the same year, William, another of the said grandsons, died, leaving issue male of his body lawfully begotten, only two sons, Edward and John Carr.

In 1789, the said Thomas and Samuel, sons of the testator, were both deceased without issue male.

On the 29th of September, 1790, by indenture of that date between Edward Southouse, one of the said grandsons of the testator, and Charles Southouse, eldest son lawfully begotten of the last-mentioned Edward, (and described as his eldest son and heir in the said indenture,) of the one part, and the said Edward Southouse, son of the said William, deceased, of the other part, the said parties of the first part did demise unto the said party of the second part one undivided third part or share of the freehold part of the Sun Tavern, being the same messuage or tenement in the said will described as the Sun Tavern, (then in the occupation of the said lessee or his under-tenants,) to hold the same unto the said lessee from the day of the date of the indenture, for the term of ninety-nine years thence next ensuing; yielding and paying unto the said lessor Edward and his assigns during his natural life, and after his decease, to the said lessor Charles, his heirs or assigns, the yearly rent of 9*l*.



On the same 29th September, 1790, by indenture of the same date, between Henry Southouse, another of the said grandsons of the testator, and Edmund Edward Southouse, eldest son lawfully begotten of the said last-mentioned Henry, (and described as his eldest son and heir in the said last-mentioned indenture,) of the one part, and the said Edward, lessee in the first-mentioned indenture, of the other part, the said parties of the first part, did demise unto the said party of the second part, one undivided third part or share of the said freehold part of the Sun Tavern, then in the occupation of the said lessee or his under tenants, to hold the same unto the said lessee, from the day of the date of the said last-mentioned indenture, for the term of ninety-nine years, thence next, yielding and paying unto the said lessor Henry, and his assigns, during his natural life, and after his decease to the said lessor Edmund Edward, his heirs or assigns, the yearly rent of 6*l.* 13*s.* 4*d.*

Counterparts of the said leases were also duly executed and delivered to the respective lessors, and produced in evidence at the trial on the part of the lessor of the plaintiff.

In 1793, the said Henry Southouse, grandson of the testator and lessor in the said indenture secondly mentioned, died, and was survived by the said Edmund Edward, his co-lessor and only issue male.

In 1794, the said Charles Southouse, lessor in the first-mentioned indenture, died without issue.

In 1799, the said Edward Southouse, lessee in the said indentures, and his said brother John Carr, were both deceased without issue.

In September, 1810, the said Edward Southouse, grandson of the testator, and lessor in the said first-mentioned indenture, died, and was survived by Edward, the lessor of the plaintiff, his son and heir at law.

In February, 1812, the said Edmund Edward, lessor in the said indenture secondly mentioned, died without issue.

The defendant Jenkins claimed possession of the said demised premises as assignee of the estate and interest of the said Edward Southouse, lessee under the said leases of 1790, and the defendant Woodhouse claimed possession of the same as assignee of a lease granted by the said last-mentioned Edward in March, 1795, purporting to be a demise of the freehold part of the Sun Tavern for sixty years, from Christmas, 1794.

On the 31st May, 1817, the lessor of the plaintiff wrote and sent a letter, demanding rent, to Thomas Roe, then acting as attorney for the defendant, and received for answer a letter from Roe, in which he stated fully the nature of the title of the lessor of the plaintiff, and suggested a particular form of receipt.

The lessor of the plaintiff, from the date of Mr. Roe's letter till the giving of the notices thereafter mentioned, received from time to time from the defendant Jenkins the several rents reserved by the said several indentures of 1790; and after receiving the said letter from the said Thomas Roe, gave receipts for the said rents according to the form enclosed in that letter, the first of these receipts being for the whole rent that had become due since the title of the lessor of the plaintiff accrued.

On the 23d March, 1827, the lessor of the plaintiff gave the defendant Jenkins notices, in due form, to quit the several premises demised by the said two several indentures of 1790 respectively.

And the defendant Jenkins having refused to comply with such notices, the lessor of the plaintiff, after the expiration of the periods in such notices limited, served the declaration in this action in April, 1828, con-

taining a demise by the lessor of the plaintiff on the 2d of April, 1828, with notices for the tenants to appear in Easter term following. And in that term, the defendants, having obtained leave to defend as landlords, entered into the usual rule to confess lease, entry, and ouster.

The jury found that the lessor of the plaintiff had established his title, but that he had by his acts confirmed the said leases of 1790.

The question for the opinion of the Court was, whether the lessor of the plaintiff was entitled to maintain this ejectment for the said two undivided third parts of the premises in question, or for either of them.

If the Court should be of opinion that he was entitled to maintain the same for both or for either of them, the verdict was to stand for the lessor of the plaintiff accordingly. But if the Court should be of opinion that he was not entitled to maintain the same for either, then a nonsuit was to be entered.

*Stephen*, Serjt., for the lessor of the plaintiff, contended that under the foregoing demise, he took one undivided third as issue in tail of the devisors's grandson Edward, and one undivided third as remainder-man in tail, under the will of Henry Southouse, the manifest object of the devisor being to make his four grandsons tenants in tail, with cross remainders between them. It was sufficient for the purpose of creating cross remainders, that the intention of the testator should appear to that effect, and the want of accurate expressions would not defeat his purpose. *Doe v. Webb*, 1 Taunt. 234; *Watson v. Foxon*, 2 East, 36; *Dyer*, 30 b; 3 *Cooper v. Jones*, 3B. & A. 425; *Holmes v. Meynel*, Sir T. Raymond, 452; *Wright v. Holford*, Cowp. 31; *Atherton v. Pye*, 4 T. R. 710; 1 Wms. Saund. 135 n. b. For the third which he took as remainder-man, he was entitled to recover, because the lease for ninety-nine years by the preceding tenant in tail was void as against a remainder-man; for the third which he claimed as issue in tail, he was entitled to recover for the same reason, unless he had confirmed the lease granted by his predecessor; but notwithstanding the finding of the jury, that had never been done, because the confirmation rested on the receipt of rent, which took place when the party was ignorant of his title, and therefore was of no effect. Per Lord Mansfield, in *Jenkins v. Church*, Cowp. 432; *Doe v. Butcher*, Dougl. 51.

*Wilde* and *Adams*, Serjts., insisted that the finding of the jury was conclusive as to the confirmation, and warranted by the facts, as a party could not be supposed to have received rent ten years in ignorance of his title.

With respect to the cross-remainder, admitting that it was a question of intention, they argued, that no intention to create cross-remainders could be collected from this will, but rather the contrary, since the testator had expressly devised to his grandsons "that part that belonged to their father," thereby impliedly excluding the part that belonged to an uncle.

*Stephen* was stopped in reply.

*Best*, C. J. In this case the father and the uncle of the lessor of the plaintiff being seised in tail, each granted a lease for ninety-nine years of one third of the premises sought to be recovered.

That granted by the father is only voidable by his issue in tail, and not absolutely void. It might, therefore, be confirmed by the lessor of the plaintiff.

Whether he confirmed was a question of fact, and the jury have found he did. It is said, indeed, this was in ignorance of his title; but he ought to have informed himself, and if he omitted to do so, can take no advantage of his own neglect. With respect to the other third, the lease was altogether void, as against the lessor of the plaintiff, supposing there were cross-remainders between him and the other devisors.

Enough may be collected from this will to show, that the testator did not intend that any part of his property should go over till all the issue of his grandsons had failed; and the question has been properly put on the simple ground of intention.

In the midst of all the darkness of this illiterate will, we can grope our way, and though what is meant by "to the last liver," is not very intelligible, there are the words "for want of issue male of any grandson." Therefore, nothing could go over till all that issue was extinct.

PARK, J. It is almost absurd to say that the lessor of the plaintiff was ignorant of his title. If the property was valuable, as it perhaps is, he would of course inquire into the title. This applies only to one third. As to the other, the question is, Whether an intention can be collected to create cross-remainders. The language of the devise over is the material thing, and from that such an intention may sufficiently be collected.

BURROUGH, J., and GASELEE, J., concurred. Judgment for the lessor of the plaintiff as to one third.

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### GARNER v. SHELLEY and Others. — p. 477.

By the rules of a friendly society, a medical attendant was entitled to 3s. per annum from every member; and a committee of the society were authorized to settle all disputes, grievances, &c., relative to the affairs of the society, subject to an appeal to two magistrates.

The plaintiff, who had been duly appointed medical attendant, was dismissed by the committee without any meeting of the members of the society at large, and another appointed. Upon an application to magistrates, they recommended a public meeting; which being convened accordingly, a large majority of the members voted for the plaintiff, who thereupon sued the defendant, the treasurer, for the 3s. received to the use of the medical attendant:

Held, that the plaintiff was entitled to recover, and that the defendant was not exonerated by an order of the committee not to pay.

THIS was an action of assumpsit, in which the declaration contained counts for money had and received by the defendants to and for the use of the plaintiff, and for money due upon an account stated between them.

The cause came on for trial at the last Stafford assizes, when the jury found a verdict for the plaintiff, with 15*l.* 9*s.* damages, subject to the opinion of the Court upon the following case:—

The plaintiff was a surgeon and apothecary. In the year 1821, a friendly society was established at Yoxall, subject to certain rules, orders, and regulations, which were in due manner allowed, confirmed, and approved by justices of the peace assembled at a general quarter sessions of the peace; and the said rules, orders, and regulations, as well as the tables of the said society, were deposited with the clerk of the peace, and enrolled at the same sessions. Among the said rules, orders, and regulations, were the following, viz.:

1st. That the society was established for the purpose of raising by subscription from the several members thereof, and by voluntary contributions, a stock or fund for their mutual relief and maintenance in old age, sickness, and infirmity, and for the benefit of the widows and representatives of deceased members in certain cases, and for no other purposes whatsoever.

2d. That twelve discreet and intelligent persons, members of that society, should be annually chosen as a committee; which committee, or any five of them, including the stewards or their proxies, should have the power to inquire into, settle, and determine all grievances, differences, and disputes whatsoever, which might or should arise rela-

tive to the affairs of the society, save and except that the parties aggrieved might appeal to any two magistrates, as empowered by the acts relating to friendly societies. The committee, under the control of the high and deputy stewards, should have power to lend and dispose of the society's money at interest, in such way and manner, and in such sums as they believed to be most advantageous to the society, taking good and proper security for the same. The old committee should nominate and appoint the persons composing the new one, and six of them at least should be annually changed by ballot immediately after the new committee was chosen and formed. They, the said committee, should agree upon and appoint three sufficient, discreet, and intelligent persons among the twelve composing such committee to act as stewards, the one as high steward, the other two as deputy stewards, to assist and help him, the said high steward, in the execution of his office. The high steward, in all matters of dispute or disagreement, either in the committee or society at large, should always have the power and privilege of the casting voice; and if he should find it requisite to consider further the subject under discussion or in dispute, should, for that purpose, be at liberty to withhold his determination for the space of one month or twenty-eight days, provided the subject would admit of such delay. The three stewards should give their joint bond to the society for the stock intrusted to their care and disposal; they should make up their accounts, and deliver up every thing belonging to the society to the succeeding stewards the next club-night after their being appointed, or forfeit 10*l.*; and no action or suit whatsoever should be commenced without the approbation and consent of the committee, or the major part of them, the high steward having in that case, as in all other cases, the privilege of the casting vote.

16th. That each member should pay 3*s.* annually to the society's doctor, in consideration of which, in case of sickness or lameness, he should be entitled to the necessary medicines and attendance his situation might require; every member to pay the doctor, whether in or out of his limits, provided he resided not more than five statute miles from Yoxall, and the first payment should become due on the 19th March, 1822.

By the 23d, three stewards, whose names were therein mentioned, were appointed.

When the society was established in 1821, the plaintiff was duly appointed the doctor to the society, and continued to fill that situation without any interruption till the month of August, 1826; but, before that time, complaints of his negligence and misconduct as such doctor had been made by different members of the society to the high steward, and to some of the members of the committee.

On the 14th August, 1826, a meeting of the committee was held, at which eleven members attended. No notice of that meeting was given to the plaintiff. After the committee had assembled, the plaintiff was sent for, but was not at home, and did not attend. A Mr. Fernyhough was also sent for. At this meeting the complaints against the plaintiff were discussed, but no evidence was given of the facts, and a vote of his dismissal, and the appointment of Mr. Fernyhough, was carried. Eight persons voted for Fernyhough, and two for the plaintiff.

The following was a copy of the resolution of the committee:—

“Resolved, that Mr. John Garner, the surgeon and apothecary of the society, be henceforth dismissed from that office, and that Mr. Joseph  
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Fernyhough, surgeon and apothecary, be appointed to succeed him, and a proper proportion only of the members' subscription to the surgeon and apothecary be paid to the said John Garner for the period he has acted as such during the present year to this time, and that the remainder of such subscription be paid to the said Joseph Fernyhough. Also ordered, that a copy of the following notice be delivered to Mr. Garner forthwith."

"Sir, — You are hereby informed, that the committee of the Yoxall New Friendly Society, having met this day to consider the propriety of continuing you as surgeon to the society, it is agreed, that your services shall cease from this day. I remain, for the deputy stewards and committee,

"Yours, &c.,

"JOHN JACKSON."

A copy of such notice was delivered to the plaintiff on the same or on the following day. The proportion of the members' subscription up to that time was paid to the said plaintiff, who did not, however, acquiesce in the dismissal, but did continually from thence attend as many of the members of the society as would permit him to do so, amounting to more than the majority; and seventy-five of them. the whole number being from 100 to 110, signed a paper approving of him as the doctor.

The Judge left it to the jury to say, whether the proceedings of the committee were bona fide for the investigation of the complaints, or merely for the purpose of getting rid of the plaintiff, and appointing another medical man. The jury found the latter, and said the plaintiff was an injured man. The plaintiff had been and was then a member of the society.

The defendants, on the 19th March, 1827, were elected stewards of the society, and continued to act as such till the month of May, 1828; and in the early part of that year received from each of the several members of the society, according to the usual course, the sum of 3s. for their respective payments to the society's doctor, under the 16th rule, for one year, ending 19th March, 1828, which sums amounted to 15l. 9s. Upon the 11th March, 1828, the following order was made by the committee, and entered upon the books of the society: — "At a meeting of the stewards and committee of the Yoxall New Friendly Society, held at the Golden Cup Inn in Yoxall, this 11th day of March, 1828, ordered, that the sum of 15l. 12s. be paid to Mr. Joseph Fernyhough, surgeon and apothecary to the said society, that sum being the amount due to him for medicines and attendance for and on the sick and lame members thereof, we, the undersigned stewards and committee of the society aforesaid, considering the said Mr. Joseph Fernyhough the legally-appointed surgeon and apothecary to such society; and we also further ratify and confirm his appointment to the said office. As witness our hands."

This was signed by the high steward and ten others, members of the society.

Disputes having arisen respecting the aforesaid vote of dismissal of the plaintiff, the committee, (including the present defendants,) and many members of the society, attended before two of the justices of the peace of the county of Stafford.

It was denied on the part of the defendants, that the magistrates had authority, under the statutes, to settle the matter themselves or make any order respecting it; but, upon their recommendation, a public meeting

of the said society was held on the 17th December, 1827 of which the following notice was given:—

“Yoxall New Friendly Society, December 6, 1827.

“It having been agreed, in pursuance of the recommendation of the magistrates at their meeting at Whichnor Bridges on Saturday last, that the votes of the members should be taken at the next club-meeting to be held on the 17th December instant, for a surgeon to the club, you are requested to attend, to give your vote on that occasion.”

The meeting was attended by the present defendants, who were stewards, the rest of the committee, and by a very large majority of the members of the society; and at such meeting, fifty-three voted for Garner, eleven were neuter, and three voted for the rival surgeon.

The plaintiff, before the action was brought, demanded the money of the defendants, who refused to pay him, alleging that the committee considered Mr. Fernyhough to be the legal doctor.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover from the said defendants the said sum of 15*l.* 9*s.* above demanded, or any and what part thereof. If the Court should be of opinion that the plaintiff was so entitled, the verdict was to stand for such sum as they should think fit; if not, a nonsuit was to be entered.

*Spankie*, Serjt., for the plaintiff, was stopped by the Court.

*Russell*, Serjt., for the defendants, contended, first, that under the second rule for settling all disputes, &c., the committee had the power to dismiss the doctor without the concurrence of the rest of the society, and that, if so, the plaintiff, having been duly dismissed, was incompetent to maintain the present action;

And, secondly, that at all events, the defendants, having acted under the orders of the committee in refusing to pay the plaintiff, were not liable to be thus sued. The 59 G. 3, c. 123, s. 9, made the rules of the society binding, subject to an appeal under 33 G. 3, c. 54, s. 15; and, after Fernyhough had been duly appointed, the defendants would have no answer to an action by him for the very sum now claimed by the plaintiff.

BEST, C. J. I am of opinion that this action is maintainable. It does not appear that the matter in which the committee have taken upon themselves to decide, is a dispute or grievance which it was within their province to determine on; and the jury have found, in effect, that they were not acting so much with a view to remedy a grievance, as to promote a job for bringing in as medical attendant a friend of some of the influential members. Then the parties go before a magistrate, a meeting is convened pursuant to his recommendation, and it is agreed, by a great majority of the society, that the plaintiff shall be restored. After that, what had been done before, was undone. As to any claim of Fernyhough, if the defendants pay him, they will do so in their own wrong; but, at all events, paying the wrong person will not exonerate them from paying the right.

PARK, J., concurred.

BURROUGH, J. To have given any color to the dismissal of the plaintiff, there should have been a summons, evidence, and hearing. There is no proof that the dismissal was authorized, and our judgment must be for the plaintiff.

GASELEE, J., concurred.

Judgment for the plaintiff

## J. EVANS v. WHYLE. — p. 485.

Defendant guaranteed the payment of gold with which plaintiff should supply a goldsmith for the purposes of his trade. Plaintiff discounted bills for the goldsmith, and gave him for them partly gold and partly money; the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills:

Held, that the defendant was not liable under his guaranty for the gold so furnished.

THE defendant guaranteed the plaintiff, to the extent of 50*l.*, payment for any gold he might supply to Evan Evans, a working goldsmith, for the purpose of carrying on his business.

After supplying Evan Evans for some time, the plaintiff, upon the application of E. E., discounted certain bills of exchange for him, and furnished the amount of the bills partly in money, and partly in gold, deducting from the gold the usual charge for credit for the length of time the bills had to run, and from the money, interest at the same rate. Evan Evans did not indorse the bills, but the gold was applied by him in the purposes of his business.

The bills having been dishonored, the plaintiff sued the defendant on his guaranty. At the trial before *Bent*, C. J., London sittings after Hilary term, it was objected, on the part of the defendant, that the plaintiff's gold, although applied by E. E. to the purposes of his business, was not sold by the plaintiff to him for the carrying on of that business within the meaning of the guaranty, but was in effect part of the purchase-money paid by the plaintiff for bills he had discounted, and which, having so purchased without E. E.'s endorsement, he had taken at his own risk.

The learned Chief Justice, however, thinking the transaction a supply of gold within the terms of the guaranty, a verdict was found for the plaintiff; which

*Wilde*, Serjt., upon the grounds urged at the trial, obtained a rule nisi to set aside.

*Taddy*, Serjt., showed cause. The fact that the gold was applied in E. E.'s business, is conclusive to show that the supply was within the meaning of the guarantee. E. E. was to be the original creditor: it was contemplated that credit should be given to him to the extent of 50*l.*; and the mode in which he should propose to make his payments in the first instance could not alter the nature of the transaction, or aggravate the defendant's responsibility. Gold was to be furnished; E. E. was to pay for it if he could, and if not, the defendant. The gold was furnished: E. E. attempted to pay for it by bills not due (allowing for the discount), and, those bills failing, the defendant is liable. Gold was to be transferred by the plaintiff to E. E. for value from E. E. or the defendant: the transaction is the same in substance, whether the plaintiff be called the purchaser of the bills with gold, or E. E. the purchaser of the gold with bills. At all events, the plaintiff was to have the value of his goods secured to him; and, having failed to obtain it from E. E., he is entitled to it from the defendant under his guarantee.

It might have been otherwise if the gold had been taken, not for the purposes of trade, but merely to raise money; of that there was no evidence, and the fact of its having been employed in the trade negatives the supposition.

*Wilde*. Guarantees are to be construed strictly, and a mere surety is not to be made liable by any implied extension of the terms of his engagement.

Although the gold was applied in E. E.'s trade, there is a manifest distinction between one who supplies gold, trusting to the buyer for the payment of the value, and one who buys bills of exchange by discounting them, and looks for his profit solely to the parties liable on the bills. That the plaintiff did so in this case is clear from his not requiring E. E.'s indorsement to the bills; and whether he paid for those bills by money, or gold, or goods, is perfectly indifferent: it is a transaction in which he is buying the bills at his own risk, and not one in which he is selling the money, or the gold, or the goods, on the credit of the person who takes them. If so, although it is a mode by which gold has been transferred for value from the plaintiff to E. E., it is not a mode within the terms or meaning of the guarantee.

In *Emly v. Lye*, 15 East, 7, where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker, it was holden, the latter had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership account; the money having been advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loan to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account. And in *Ex parte Isbester*, 1 Rose, 21, A., the payee of a bill of exchange, indorsed it blank and delivered it to B.; B. wrote above the blank indorsement, pay C. or order; B. took up the bill after a commission of bankrupt had issued against the acceptor. His petition, that he might be at liberty to prove it under the commission, was dismissed. So that here is clearly no debt due from E. E. for gold sold, which was all the guarantee contemplated.

BEST, C. J. The opinion which I entertained at the trial has been changed, and I think this rule ought to be made absolute. This is an action on a guaranty, touching the sale of gold from the plaintiff to Evan Evans; and it was understood between the parties, that the gold furnished to Evan Evans was to be used in his trade. The question which has arisen is, Whether gold advanced by the plaintiff, together with money, in discounting bills for Evan Evans, is gold supplied within the meaning of the guaranty. I think it is not. The defendant only meant to pay for such gold as was sold to the original debtor: this was not sold by the plaintiff, but paid on the purchase of bills of exchange, and the cases cited clearly establish the distinction between payment for goods by bills, and transferring bills when they are discounted. This, therefore, was not a transaction within the meaning of the guaranty, by which the defendant was proposed to be responsible for gold sold to Evan Evans in the way of his trade. Guaranties ought to receive a strict construction; and they should be so drawn up as to embrace in terms the dealing intended to be guarantied.

PARK, J. The distinction is to be collected from the cases which have been cited. If a party sells goods, and takes for them a bill of exchange which is not honored, he is remitted to his original consideration; but if he discount bills for money to one who does not even indorse them, it is a purchase of the bills at his own risk.

The rest of the Court concurred, and the rule for a new trial was made Absolute.



## TERRINGTON, Assignee of PULLAN, a Bankrupt, v. HARGREAVES and Others.

The bankrupt act, 6 G. 4, c. 16, s. 82, is retrospective.

Therefore, where the bankruptcy took place, June 26, 1822, and the bankrupt paid the defendant, who knew of his insolvency, a sum of money August 4, 1822, and a commission was sued out against the bankrupt in May, 1823: Held, that the assignees could not, subsequently to the time when the 6 G. 4, c. 16, came into operation, sue the defendant for money had and received.

UPON an action by the plaintiff, as assignee of Pullan a bankrupt, commenced in Trinity term, 1827, against the defendant for money had and received, the jury, at the trial before *Best*, C. J., London sittings after last Michaelmas term, found the following special verdict:—That the said Richard Pullan, the bankrupt, on the 26th of June, in the year of our Lord 1822, was, and for some time before that day had been, a trader within the meaning of the bankrupt laws, at Leeds, in the county of York. That, on that day, he was indebted to the plaintiff, Richard Terrington, the petitioning creditor, under the commission afterwards issued against him, in the sum of 1,100*l.* and upwards. That being such trader, and being so indebted to the said Richard Terrington, afterwards, on the 26th day of June, 1822, the said Richard Pullan became bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts. That a commission of bankrupt was issued against him, dated the 15th day of May, 1823, under which he was duly declared a bankrupt; and that the plaintiff and William White (whom the plaintiff hath survived) became and were assignees of the estate and effects of the said bankrupt, according to the force, form, and effect of the said statutes, and the said plaintiff now is assignee of the said estate and effects. That the said Richard Pullan was insolvent in the month of February, 1822, and remained so insolvent until the issuing of the said commission of bankrupt. That the said defendants, on the 4th day of August, 1822, received from the said Richard Pullan the sum of 165*l.* 7*s.* 6*d.*, being the first instalment of a debt due to them, for which they, with other creditors, had, on the 21st day of March preceding, agreed to take the said Richard Pullan's notes, payable at four, eight, twelve, and sixteen months. And that, at the time when they so received the said sum of 165*l.* 7*s.* 6*d.*, they knew that the said Richard Pullan was insolvent, but did not know that he had committed any act of bankruptcy.

*Wilde*, Serjt., for the plaintiff. With respect to payments made by a bankrupt after an act of bankruptcy, and before a commission sued out against him, the 6 G. 4, c. 16, s. 82, is not retrospective, where, as in the present case, the commission was sued out before that act came into operation.

Section 135 enacts, "That nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or upon or against any bankrupt against whom any commission has or shall have been issued, except as is herein specifically enacted." The assignees, under a commission sued out previous to the act, had an existing right at the time the act passed; and the cases in which it is specifically provided the act shall have a retrospective operation, as in sections 112, 123, 131, exclude the possibility of giving it such an operation in any cases not expressly provided for.

It is true, the expression "payments made," in s. 82, as contrasted with "hereafter to be made," may seem of itself to have an express retrospective operation, as the Court appears to have thought in *Churchill v. Creese*, 5 Bingh. 180. But when the word "made" in the eighty-second section is con-

nected with the language of the 135th section, touching the validity of existing rights, it may be easily satisfied by confining it to cases where the payment has been made before the act came into operation, and the commission has been sued out, and the action in respect of the payment commenced, subsequently to the acts coming into operation. In such case, as the assignees under such subsequent commission would have had no existing right at the time the act came into operation, the word "made" in the eighty-second section might have its retrospective effect consistently with the provisions of s. 135, and with the general principle which precludes a law from having an ex post facto operation, unless where its terms are precise to that effect. But where the commission has been sued out, as well as the payment made, before the act came into operation, and the assignees under such commission will consequently have been in possession of any existing right to sue under the old law in respect of such payment, it will be a violation of the 135th section, and not in conformity with the eighty-second, to give it a retrospective effect.

*Merewether*, Serjt., contra, relied on *Churchill v. Crease*, contending that the word "made," as contrasted with "hereafter to be made," could only have a retrospective operation, and that the eighty-second section had made no distinction between the two classes of commissions in that respect.

BEST, C. J. If I am in error, as this case is on a special verdict, my error may be set right, but I entertain still the opinion expressed in *Churchill v. Crease*, which cannot, I think, be distinguished from the present case. The point has been well argued. It has been contended on the one side, and conceded on the other, that the provisions of a statute cannot be retrospective unless declared to be so by express words. I accede to that position; but there are words in the eighty-second section which expressly render that section retrospective, and which have no meaning unless such a construction be adopted. An ingenious argument has been used, to show that sense may be made of those words without giving them a retrospective operation under circumstances such as the present; and, if that could be done, I should agree in the conclusion which the counsel for the plaintiff has attempted to establish; but the words of the section are, "that all payments really and bona fide made, or which shall hereafter be made, by any bankrupt or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed." To what time does that relate? To the time of passing the act, or to the present time? In *Churchill v. Crease*, I am reported to have said, "Unless the expressions, 'payments made,' refer to a period anterior to the passing of the act, the expression, 'hereafter to be made,' is altogether nugatory. It seems to me, therefore, that the legislature contemplated all payments actually made at the time the act came into operation." I think I must have been misunderstood, and that I could not have let fall such an expression; at all events, I did not intend, upon that occasion, to say, that the expression "payments made" must be nugatory unless it referred to a period anterior to the passing of the act, but merely that the words, "payments made," must apply to some time; that they could apply to no other time than

that of passing the act; and, if so, must comprehend payments made before that time.

The section is not so clear as it might be, but it is not easy to put any other interpretation on it.

PARK, J. "Payments made" must, according to the common meaning of the words, be construed retrospectively, and "hereafter to be made," prospectively. I see no reason to alter the opinion I expressed in *Churchill v. Crease*.

BURROUGH, J. "Made," succeeded as it is by "hereafter to be made," mean, made before the act.

GABLEE, J., concurred.

Judgment for the plaintiff.

### HOVILL v. STEPHENSON. — p. 493.

Where the plaintiff, in an action on a charter-party, had communicated to the attesting witness an interest in the adventure subsequently to the execution of the instrument: Held, that evidence of his hand-writing was inadmissible.

THIS was an action upon a charter-party. At the trial, before *Park, J.*, London sittings after Hilary term, it appeared that, after the execution of the instrument, the attesting witness was, by agreement with the plaintiff, admitted to a share of the profits which the plaintiff expected to arise from his bargain. An objection was taken to the competency of the witness, and his evidence was rejected, he having refused to release his interest. It was then proposed to prove his hand-writing. This proof was objected to, and the objection allowed by *Park, J.*, who tried the cause. The plaintiff, not being able to prove the charter-party, was nonsuited.

*Taddy*, Serjt., obtained a rule nisi to set aside this nonsuit, on the ground that the evidence offered by the plaintiff had been improperly rejected.

*Wilde*, Serjt., showed cause. The testimony of the attesting witness, and the evidence of his handwriting, were both properly excluded. It would be most mischievous if a party could be allowed to place in the box a witness to whom he himself had given an interest in the event of the cause; and it would be equally mischievous if, by mere proof of his handwriting, he could not withdraw from interrogation a witness whom it might be material to his opponent to examine. A case such as the present does not fall within any of the exceptions which permit examination of an interested witness, or proof of his handwriting. As where, subsequently to the execution of the instrument, the witness becomes interested by operation of law; as by becoming executor or administrator. *Goss v. Tracey*, 1 P. Wms. 287. In *Honeywood v. Peacock*, 3 Campb. 196, as the defendant knew of the situation in which the attesting witness stood, and yet desired him to attest, it was holden he should not afterwards be allowed to object to his testimony. But the general principle on which an attesting witness is excluded from giving testimony if interested, and proof of his handwriting is rejected, was established in *Swire v. Bell*, 5 T. R. 371, and has not been departed from. And in *Forrester v. Pigou*, 1 M. & S. 9, the first underwriter upon a policy, who had paid the loss upon an understanding that he was to be repaid in the event of the action against another underwriter failing, was held an incompetent witness.

*Taddy*. The original object of calling the attesting witness was, not so

much to show the circumstances attending the execution of the instrument, as the signature of the party executing. If the witness had been rendered interested with a view to giving him an improper bias, if there were any fraud in the transaction, that might be a ground for rejecting him, and proof of his handwriting. But here the plaintiff concealed nothing, and fraud was never imputed. To exclude all proof of the deed under such circumstances could answer no good purpose, and must work great injustice. If proof of the witness's handwriting may be admitted where he becomes a general partner with the party suing, it is not easy to say why it should not be admitted, when he becomes partner only in the particular adventure, inasmuch as his interest in the latter case is only a fraction of his interest in the former.

In *Godfrey v. Norris*, 1 Str. 34, where the attesting witness to a bond sued as administrator to the obligee, no distinction was made as to the source whence the interest proceeded, although it was urged that he might have permitted another to take out administration: and proof of his handwriting was admitted. And in *Buckley v. Smith*, 2 Esp. 697, proof of the attesting witness's handwriting was admitted, although it was clearly by act of the party that she had become interested, for the plaintiff had married her. *Suire v. Bell* turned on the circumstance that the witness was interested at the time of the execution of the deed, as well as at the time of the trial.

*Cur. adv. vult.*

BEST, C. J. This is an action upon a charter-party. After the execution of the instrument, the attesting witness was, by agreement with the plaintiff, admitted to a share of the profits which the plaintiff expected to derive from his bargain. An objection was taken to the competency of the witness, and his evidence was rejected, he having refused to release his interest. It was then proposed to prove his hand-writing: this proof was objected to, and the objection allowed by my brother *Park*, who tried the cause. The plaintiff, not being able to prove the charter-party, was nonsuited.

A motion has been made to set aside this nonsuit. My brother *Burrough* was absent when this case was argued, but the rest of the Court are of opinion that this evidence was properly rejected.

There are many cases where a subscribing witness has acquired an interest after the execution of the instrument attested by him, in which it has been decided that proof of his hand-writing may be received to establish such instrument.

The hand-writing of a subscribing witness who has been appointed an executor or administrator, or has married the person to whom the instrument was given, has been allowed to be proved. We do not dispute the authority of any of those decisions; on the contrary, we should be disposed to extend the principle established by them to the case of a man entering into a partnership, and becoming interested in instruments by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member.

Necessity requires that, in all these cases, such evidence should be received, as otherwise parties must lose the rights secured by the instruments attested, or forego accepting of situations most important to their welfare.

It would be a hard thing, if the law were to say that a man should not become an executor or administrator, or except a beneficial partnership, without giving up debts due to the estates in which he has acquired an interest. But, in the present case, the witness has only obtained an in-

terest in the contract which he was to prove, and that interest he derived immediately from the plaintiff, who proposed to call him. The plaintiff cannot complain that his witness is disqualified, when he himself has been the cause of his disqualification.

That the interest was considered by the witness to be so valuable as to be likely to affect his testimony, is proved by the circumstance, that he refused to release it. It would be improper to allow a plaintiff to give such an interest to a person, in the particular transaction in which he is obliged to call him as a witness, as is likely to bias his testimony.

A learned writer (who has devoted too much of his time to the theory of jurisprudence, to know much of the practical consequences of the doctrines he has published to the world) has said, that interest should only operate against the credit, and not be an objection to the competency of a witness. This doctrine is, however, contrary to our law; for, according to that law, a direct interest to the smallest amount in any person, will prevent such person from being examined as a witness.

This rule does not stand upon the principle that Mr. Starkie supposes, viz., that the law can make no distinction between the degrees of interest; but upon this, that if the party declines releasing his interest, whatever may be its amount, it seems that he feels it of importance to him, and therefore cannot be trusted as a witness in a suit instituted for the recovery of it. A feeling of interest will, in spite of the utmost efforts of the most conscientious man, often so warp his memory, as to prevent him giving an accurate account of any transaction in which he is concerned.

Considered the interest of parties, and that which is of still more importance — the interests of the public and of religion, which require that every possible means should be used to prevent false evidence, the law cannot be too strict in excluding the testimony of interested witnesses. It is true that prejudices will often influence the mind of a witness as much as interest; but this is an evil that cannot be remedied. If we want the testimony of witnesses, we must be content to take it with all the defects that the infirmities of those who give it may occasion. We may require a witness to release his interest, but we cannot compel him to release himself from his prejudices. Because we cannot do all we wish, we should not fail to do all we can to get at truth.

The case of *Forrester v. Pigou* is stronger than the present. The plaintiff in that case gave the witness an interest after the cause of action accrued, without the privity of the defendant, and yet the Court would not allow the defendant to call him. If a plaintiff in such a case as this had a right to say, You must either allow me to call a witness whom I have rendered interested to support my claim, or allow me to prove his hand-writing, you put a defendant under the necessity of having a case proved against him by an interested witness, or giving up the opportunity of obtaining a knowledge of any circumstances that occurred at the time of the execution of the instrument by the cross-examination of the attesting witness.

Let the rule for setting aside the nonsuit be discharged.

Rule discharged accordingly.

## KNOWLES v. BLAKE and THOMAS. — p. 499.

Plaintiff distrained defendant's cattle damage feasant, and went to apprise defendant: during his absence the cattle escaped for half an hour into defendant's ground, whence plaintiff, on his return, drove them to his own yard: defendant having taken them thence,  
Held, no rescue.

**RESCUE.** At the trial, before *Garrow*, B., last Sussex assizes, it appeared that the plaintiff's son, having seen the defendant Blake's horses trespassing in his father's field, was in the act of driving them to the pound, when he left them for the purpose of apprising the defendant Blake of what had happened.

While he was out of sight on this errand, the horses strayed from the plaintiff's field into the defendant Blake's shrubbery, where they remained nearly half an hour; at the expiration of which time, the plaintiff's son, having failed to obtain redress from Blake, drove the horses out of the shrubbery into the plaintiff's yard, whence they were shortly afterwards rescued by the defendants.

Thomas suffered judgment by default.

It was objected that here was no rescue, because the distress had been abandoned by the plaintiff's son allowing the cattle to escape into and remain in the shrubbery, whence he had no right to remove them.

A verdict was found for the plaintiff, subject to a motion to set it aside.

*Cross*, Serjt., accordingly moved to set aside the verdict, and enter a verdict for the defendant instead.

He contended, that there had been no sufficient distress of the horses in the first instance, no declaration of any intention to distrain having been made at the time; but if there had been a distress, it was abandoned when the horses were permitted to escape into and remain in Blake's shrubbery; and the second caption being a trespass, the defendants had not been guilty of rescue. According to Lord *Coke*, Co. Lit. 161 a, "If the cattle themselves, after the view, go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distress, then cannot the lord distrain out of his fee, and if he doth, the tenant may make rescous."

*Andrews*, Serjt., contra. No precise form of words is necessary for a distress. It is sufficient if the intent to distrain be manifest. *Clement v. Milner*, 3 Esp. N. P. C. 95. [Best, C. J. That point was decided in *Wood v. Nunn*, 5 Bingh. 10.] Then, "if the tenant or any other, to prevent the lord to distreyne, drive the cattle out of the fee of the lord into some place out of his fee; yet may the lord freshly follow, and distreyne the cattle, and the tenant cannot make rescous, albeit the place wherein the distress is taken, is out of his fee." (Co. Lit. 161 a.)

Where the distrainer only leaves the cattle in order to apprise their owner of the distress, and they escape during his absence, he must be taken to follow freshly, if he proceed with the distress immediately on his return.

*Cur. adv. vult.*

BEST, C. J. Two questions have been raised in this cause. Upon the first, we all think that the distress was sufficiently made, for no precise act or form of words is essential to a distress. But distress is a matter of strict right; and if he who distrains, damage feasant, permits the cattle to escape, he must look for some other remedy. A mere escape for an instant, indeed, if the distrainer followed, would not be an abandonment of the distress; for Lord *Coke* says, "When a man hath taken a distressee, and the cattle distreynd as he is driving of them to the pownd go into

the house of the owner, if he that took the distress demand them of the owner, and he deliver them not, this is a rescous in law." Co. Lit. 161. a. But here the plaintiff's son permitted the horses to stay in the defendant's shrubbery for half an hour: they were not demanded during that time; and that was an abandonment of the right of freshly following. Lord Coke says, "If the cattle of themselves after the view go out of the fee, then cannot the lord distreyn them." Ibid. And in *Vasper v. Edlows*, Holt, 257, Lord Holt says, "If a distress for damage feasant dies in pound, or escapes, the party shall not distrain de novo; but if it were for rent, in either case, he may distrain de novo." The present is a stronger case than that, for the cattle taken had never been in the pound. Therefore, our judgment must be for the defendant Blake.

Judgment accordingly.

ARMITAGE v. BERRY and Another. — p. 501.

A note for 100*l.*, payable to A. B. or order on demand, is subject only to a stamp of 3*s.* 6*d.*

THE plaintiff sued on the following promissory note signed by the defendants: "On demand we promise to pay J. Armitage, or order, 100*l.*"

The note had a 3*s.* 6*d.* stamp. By the 55 G. 3, c. 184, sched. part 1, "a promissory note for the payment in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight," of 100*l.*,—is liable to a stamp of 3*s.* 6*d.*, and is not to be re-issued.

A "promissory note for the payment to the bearer on demand" of 100*l.*—is liable to a stamp of 8*s.* 6*d.*, and may be re-issued as often as shall be thought fit.

A verdict having been found for the plaintiff,

*Jones*, Serjt., moved to set it aside and enter a nonsuit, on the ground that the note ought to have had a stamp of 8*s.* 6*d.*; and he insisted that "payable to order on demand" was in effect the same thing as "payable to bearer on demand"—an indorsement in blank making the note payable to the bearer; and it having been decided that a promissory note payable to A. B. on demand (without the words either bearer or order) was a promissory note payable to bearer on demand, within the meaning of the above act. *Keates v. Whieldon*, 8 B. & C. 7. But

The Court were clearly of opinion, that the note being payable to order on demand, fell within the description of those payable "in other manner than to the bearer on demand;" and the rule was

Refused.

## EVERETT v. DESBOROUGH. — p. 503.

1. In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life insured, and the servant of the insurance-office undertakes to do all that is required by his office.
  2. Plaintiff effecting an insurance on the life of H., with whom he was unacquainted, desired the agent of the insurance-office to do all that was requisite. The agent knew H. well, and made the usual inquiries. One of the terms of the contract was, a reference to the usual medical attendant of the life insured.
- H. having given a false reference: Held, that the plaintiff could not recover.

ASSUMPSIT on a policy of insurance, effected for the plaintiff on the life of James House with the Atlas Insurance Company, of which the defendant was the secretary.

By the policy, certain conditions on the back of it were declared to be a part of the policy as much as if they had been repeated in the body of it.

These conditions were as follow, in two columns: —

Column the first; —

“Conditions of Life Assurance.

“Persons proposing to effect Life Assurance, will be required to state the following particulars; viz.,

“1. Name and residence of the party by whom the proposal is made.

“2. Name, residence, and profession of the person whose life is to be assured; and, in case of an assurance upon survivorship, the name, residence, and profession of each party.

“3. Place and date of birth; and age next birth-day.

“4. Sum to be assured, and the term.

“5. Whether afflicted with gout, asthma, fits, spitting of blood, or any other disorder which tends to shorten life.

“6. Whether the party has had either the small-pox or cow-pox.

“7. Whether the party will attend personally, either at the office in London, or before one of the company's agents.

“8. Whether employed in the military or naval service.

“9. Names and residences of two gentlemen to be referred to, respecting the present and general state of health of the life to be assured. One to be the usual medical attendant of the party.

“A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such a declaration be not in all respects true, the policy will become void, and the premium that may have been paid will be forfeited.”

Column the second; —

“10. No assurance to be in force until the premium has been paid; nor will any policy be considered valid for more than fifteen days after the expiration of the period limited therein, unless the premium, conditioned for the renewal of such policy, shall have been paid within that period, and the printed form of office-receipt given. But such assurances may be revived at any period, not exceeding three months after their expiration, on satisfactory proof being given to the directors of the unimpaired state of the health of the life assured, and on payment of the premium, with an addition of 5s. for every 100*l.* assured.



" 11. Policies will become void if the parties, whose lives have been assured, shall go beyond the limits of Europe, or shall die on the high seas, (except in passing, during peace, in king's ships or packet or passage vessels from any one part of the United Kingdom of Great Britain and Ireland to any other part thereof; or in passing direct, by a similar conveyance, from and to any port in Great Britain, to and from any port between Rotterdam and Brest, both inclusive, or to and from Guernsey, Jersey, Alderney, or Sark,) unless special permission shall have been granted by the directors, which may be obtained on the parties attending personally at the office, to give every requisite explanation and paying such extra premium as the directors may deem adequate to the risk incurred.

" 12. Policies will also be void if the parties whose lives have been assured, shall be actually employed in any military or naval service whatever.

" 13. Assurances, made by persons on their own lives, will be void if they die by the hands of justice, by duelling, or by suicide. But should the families of such persons be left in distress and poverty, the directors, in their discretion, will make such allowance in respect of the policies of the deceased as they may deem just and reasonable.

" 14. Assignments of life policies may be made without giving notice to the company.

" 15. Persons effecting assurances on other lives than their own, will be required to state the nature of the interest they possess in such lives.

" 16. All claims upon the company will be paid within three months after satisfactory proof shall have been produced of the death of the persons upon whose lives assurances have been effected.

" 17. In cases of assurances in Ireland, the company undertake to appear in the courts of law there to any action commenced against them.

" London, 27th December, 1825.

" By order of the Directors,

" HENRY DESBOROUGH, Jun.

" Secretary."

The declaration in the cause stated, that the plaintiff caused to be made a certain policy of assurance, whereby the Atlas Company, "relying on the truth of a certain declaration made by the plaintiff *in compliance with the conditions on the policy* indorsed, (wherein it was declared that the age of House did not exceed forty-four years; that he had had the small-pox; had not had the gout; had not suffered a spitting of blood; and was not and had never been afflicted with asthma or fits, or with any disorder which tended to shorten life.) agreed, in consideration of a premium of 37*l.* 17*s.* 6*d.*, to pay him 1000*l.* in case James House should die within a year; provided that the policy should be subject to the printed conditions indorsed thereon, in the same manner as if the same were there actually repeated, and adapted to that present case."<sup>(a)</sup> And by those conditions it was expressed and declared, that persons proposing to effect life-insurance would be required to state the following particulars, &c.: (inter alia) the names and residences of two gentlemen to be referred to, respecting the present and general state of health of the life to be assured; one, to be the usual medical attendant of the party:— a declaration as to all the above points would be considered as the basis

<sup>(a)</sup> The passage between inverted commas is the exact language of the body of the policy set out in the past tense.

of the contract between the assured and the company. And the plaintiff averred, that he did make a declaration according to the requisitions of the said printed conditions, and that the declaration so by him made, and referred to in the policy, was in all respects true. He then averred the death of House, and the defendant's refusal to pay.

The defendant pleaded the general issue; and paid the amount of the premium into Court, upon a count for money had and received.

At the trial, before *Gaselee, J.*, the following were the circumstances proved on the part of the plaintiff:

The plaintiff being known to possess some leasehold property, determinable on the life of House, was applied to by Lye, agent of the Atlas Company at Warminster, (near which place the plaintiff and House resided,) to effect an insurance with the Atlas Company.

The plaintiff agreed to insure 1000*l.*; but as he had never seen House, and knew nothing of him, he told Lye to make the requisite inquiries, and to do all that was proper in the business.

House, who at this time, and for six months preceding, had been residing with his mother, managing a farm of hers near Warminster, was a remarkably handsome, athletic man, bearing all the external indications of rude health; and was believed by Lye, who had known him since his birth, and by all the inhabitants of Warminster, to be the healthiest and stoutest man of that healthy district. He bore a good character, and was, while residing there, of remarkably temperate and regular habits.

Lye called on him at his mother's, and at a house in Bath, (sixteen miles off,) where, previously to the last six months, he had resided for some years.

In answer to the inquiry "who was his usual medical attendant," House said, "I have never had occasion for a doctor: sometimes I have taken Harvey's quack pills; but Mr. Vicary, of Warminster, knows as much of me as any man."

Mr. Vicary, a respectable and intelligent medical man, had never attended House professionally, but had known him from his birth, and had attended the rest of his family.

In a written communication made by him to the Atlas office, and in his testimony on the trial, he stated that he had never seen a stronger or healthier man.

Lye transmitted to the office a statement made by himself, in which, among other things, it was declared, that House referred to Mr. Vicary as his usual medical attendant. This statement occupied half the sheet of a letter, and was signed by Lye: Lye showed this to the plaintiff, and was beginning to read it over, when the plaintiff said, "I dare say it is all correct;" and on the other half sheet the plaintiff signed a separate declaration, that House had had the small-pox; had not had the gout, &c.; was not afflicted with any disorder tending to shorten life; and that his age, residence, and occupation were as therein described.

On the part of the office it was proved, that House, when he resided at Bath, had been wont occasionally to indulge in extraordinary fits or bouts of intoxication. At these times he would be drunk day and night incessantly for ten days, a fortnight, or even three weeks, swallowing any thing and every thing that came in his way. He was always attended after these bouts by his neighbor Harvey, a quack doctor, who bled and purged him copiously. He went over to Bath, from his mother's, shortly before

the insurance was effected, had one of these bouts, — recovered, — and died suddenly at his mother's a few days afterwards.

These facts, however, and Harvey's attendance, were unknown to the plaintiff, to Lye, and to the inhabitants of Warminster generally; and Mr. Vicary, the surgeon who examined House when the insurance was effected, asserted at the trial, that whatever his habits might have been, they had at the time of the insurance produced no perceptible effect upon his appearance or constitution.

On the part of the office it was contended, that these bouts of intoxication were a material circumstance, the non-disclosure of which avoided the policy; and that, at all events, it was a condition precedent to any liability on the part of the office that they should have been informed of the name of House's usual medical attendant; and that this condition had been neglected, Harvey having been his usual medical attendant, and not Vicary.

To this it was answered, first, that the plaintiff's warranty was only against any *disorder* tending to shorten life; that he had not warranted against pernicious *habits*; that he could not be expected to disclose what he never knew; and that, at all events, it was sufficient if House was an insurable life at the time the insurance was effected.

Secondly, that House was not the agent of the plaintiff, who, therefore, ought not to be affected by misrepresentations, if any, made by him; and that though in ordinary cases the assured might be bound to furnish all the information required by the office, yet here, the defendant's agent having solicited the insurance, and the plaintiff having left it to him to make all the necessary inquiries, the office had taken the task of inquiry upon themselves, and had absolved the plaintiff from the duties usually imposed upon the assured.

*Gaslee, J.*, left it to the jury to say, first, Whether at the time of effecting the insurance House was an insurable life; secondly, Whether there had been a concealment of any circumstance which it was material for the office to know; and, thirdly, Whether Lye had acted as the agent of the plaintiff, or of the office, or of both.

The jury found,

That House was an insurable life;

That there was no concealment of any material circumstance; and

That Lye was solely the agent of the office; and gave their verdict for the plaintiff.

*Merewether, Serjt.*, obtained a rule nisi to set aside this verdict and enter a nonsuit instead, upon the grounds urged at the trial.

He relied on *Lindenau v. Desborough*, 3 B. & C. 586, where, in an insurance effected on the life of the Duke of Saxe Gotha, it was holden that the plaintiff could not recover, because he had omitted to disclose to the insurers the circumstance that the duke was imbecile, so as to be scarcely able to speak, although it was not supposed that his life could be affected by that circumstance; on *Maynard v. Rhodes*, 5 D. & R. 266, where the party effecting an insurance on the life of another, was holden responsible for the representations made by the life insured; and on *Morrison v. Muspratt*, 4 Bingh. 60, where the Court granted a new trial, because the office had not been referred to the person who had been medical attendant of the life insured during the last illness she had previously to the insurance.

*Wilde, Serjt.*, showed cause. The conditions indorsed on the policy are of two kinds: those in the first column are preliminaries to the contract, to be attended to by persons proposing to insure, previously to their entering

into the contract; those in the second column are parcel of the contract when completed.

It is competent to the insurers to dispense with any of the preliminary inquiries, or to take the burthen of them upon themselves, or to insist that the information required shall be furnished by the assured. But if, for whatever reason, they dispense with the assured's furnishing them with that information which is usually required at his hands; if they take the responsibility of inquiry upon themselves, and then sign a policy in which they declare that all the preliminaries required by them have been observed, they cannot afterwards avoid the policy on the ground that the assured has withheld information which they never required at his hands.

In this case there was such a dispensation on the part of the insurance office. They, by their agent, take the first step, and solicit the plaintiff to insure with them. The plaintiff knows nothing of the life insured, and can give no information on the matters preliminary to the contract; but in consideration that he will give their office the preference, they engage, through their agent Lye, to make all the necessary inquiries themselves.

They do not exact from the plaintiff a declaration or warranty that House has correctly referred to his usual medical attendant; but merely that he is not affected with any disorder tending to shorten life: and drunkenness is a habit, not a disease or disorder.

The declaration as to the usual medical attendant is signed only by Lye, who is found by the jury to have been solely the agent of the office.

If, therefore, in ordinary cases the assured is bound to state accurately who is the usual medical attendant of the life insured, the office have dispensed with such a statement from him here, and have admitted such dispensation by the policy they have executed, in which they recite that the plaintiff has signed a declaration in compliance with the conditions of the policy. If they had required the plaintiff to answer for the reference to the medical man, a declaration as to House's health only,—and the plaintiff signed no other,—would not have been a compliance with their requisition.

It must be taken, therefore, that they accepted the declaration of their own agent Lye, with respect to House's usual medical attendant, as the declaration made, as to that point, in compliance with the conditions of the policy. If so, they are bound by the acts of their own agent; they are responsible for his accuracy, and cannot cast upon the plaintiff the consequences of his inaccuracy.

Lye having undertaken on the part of the office to procure the proper reference, it is no longer any part of the plaintiff's warranty. Lye's seeking the information at the hands of House was merely accidental; he was at liberty to inquire where he pleased; but the plaintiff could not be responsible for the falsehoods or inaccuracies of strangers whom Lye might consult; and to the plaintiff House was an entire stranger. To bind the plaintiff, a representation must have been made either by himself or his agent. But the plaintiff himself was absolved by the office from making any representation on the subject of the usual medical attendant; it is impossible to say that House, whom he had never seen, was his agent; and Lye was the agent of the office.

And this distinguishes the present case from those which have been relied on, on the part of the defendants.

In *Lindenau v. Desborough*, the decision turned on the plaintiff's omitting to disclose a material fact which must have been within his knowledge or that of his agents; the state of the mental faculties of the life insured; there was no undertaking on the part of the office to obtain at their own

risk the information he ought to have supplied; no waiver of any condition usually imposed on the assured. The same remark is applicable to *Morrison v. Muspratt*, where a husband who had effected an insurance on the life of his wife fraudulently omitted to disclose the circumstance of her having been long afflicted with pulmonary disease, and the name of the medical man who had attended her.

In *Maynard v. Rhodes* the declaration in the cause alleged that Colonel Lyon, the life insured, had himself subscribed and delivered into the Pelican office, a declaration setting forth his ordinary and then state of health; and that such declaration did set it forth truly, and was part of the consideration for the defendant's entering into the contract.<sup>(a)</sup> It appeared that Colonel Lyon was known to the plaintiff; that he was sent to the office to be examined personally on the 23d of May, 1823; and that upon that occasion he signed a declaration that a gentleman of Chichester was his medical attendant; that he had never been seriously ill, and was then in good health; whereas from the month of February preceding that declaration to the month of June after, he had been attended in London by Dr. Veitch and Mr. Jordan on account of a determination of blood to the head, for which he was bled and blistered, and underwent other medical regimen.

There, the plaintiff took upon himself to aver that the declarations of the life assured touching his health were true; an averment which he could not establish in point of fact.

The plaintiff in the present case has set out the declaration he made himself. That declaration is confined to the age, profession, and exemption from mortal disorder of the life assured; and that declaration he has proved, as well as averred, to be true.

The preliminary reference to his medical attendant by the life assured forms no part of the declaration signed by the plaintiff, and formed no part of his contract with the office, inasmuch as they had absolved him from giving them any information on the subject, and had through their agent Lye taken the risk of inquiry on themselves.

*Merewether.* The basis of the contract between the plaintiff and the office, is, among other things, that the office shall be informed who is the usual medical attendant of the life insured; and whether that information was to be obtained by Lye for the office, or to be communicated by the plaintiff, or by the life insured as constructively agent for both parties, the plaintiff by signing the contract enters into a warranty that the reference to the medical attendant is a correct reference.

Admitting, however, that Lye was the agent of the office for all inquiries from which it was possible to exonerate the plaintiff, and which the office could make independently of him or his agents, yet for the purpose of stating what is his health, or who is his medical attendant, the life insured is impliedly and necessarily the agent of the party who effects the insurance. His agency for the party insuring, in all matters which can only be learnt from him, is perfectly compatible with Lye's being agent for the office in all other matters usually cast upon the party insuring. The life insured is the only person who can give the required reference correctly. He is not the agent of the office, because they are not the persons called on, but calling, to act; not the persons required, but requiring the reference to be given; he must, therefore, be the agent of the party at whose hands that reference is required; the party who, as the basis of his contract, is called on to warrant that the reference, however obtained, by whomsoever furnished, is, at all events, true.

(a) This circumstance is not adverted to in the printed report.

The plaintiff, if he could not place sufficient reliance on the declarations of the life insured, might easily decline to enter into any such warranty, or to sign any such contract; but if he signs it the office ought not to suffer from the temerity of his warranty; for it is plain that they would never have entered into the contract, at least upon the same terms, if they had spoken with the usual medical attendant.

BEST, C. J. No longer ago than when the case of *Morrison v. Muspratt* was decided, this Court held, that if there was reference to a man who *had been* the medical attendant, and no reference to the person who *was* the medical attendant of the life insured at the time the policy was effected, such an omission to refer to the proper person would vacate the policy. This Court granted a new trial in that cause, in consequence of a supposed misdirection of Lord *Tenterden*. Lord *Tenterden* afterwards, in *Lindenau v. Desborough*, spoke in terms of approbation of the decision of this Court, and in effect said, that he considered the decision of this Court as the rule which ought to guide him in giving his direction to the jury in that particular case. How is that case of *Morrison v. Muspratt* to be distinguished from the present? In that case, undoubtedly, the reference, as my brother *Wilde* has stated, was made by the assured; in this case, the reference made is not by the assured, but by the person whose life was insured. Then, is the assured affected by any misrepresentation of the person whose life is insured? In the case of *Maynard v. Rhodes*, that very point was decided by the Court of King's Bench. Colonel Lyon, the life insured by the plaintiff, in conformity with the regulations of the insurance office, attended to give the usual information as to the state of his health, and in the result the policy was effected. Colonel Lyon concealed or misrepresented a material circumstance touching his health. The learned Judge told the jury, if they were satisfied that the representation made by Colonel Lyon was not substantially true at the time the policy was effected, the plaintiff would be bound by the consequences of such misrepresentation, although he himself was not privy to the falsehood. A motion was made for a new trial. The judgment is given by Mr. Justice *Bayley*, Mr. Justice *Holroyd*, and Mr. Justice *Littledale*. The first says, "I am of opinion that the direction of the Lord Chief Justice to the jury was correct in point of law." Mr. Justice *Holroyd* says, "If the jury were satisfied that the representations made by Colonel Lyon himself were untrue, it can make no difference in the legal result whether the policy was effected for his benefit or not; it was a conditional policy, and the party for whose benefit it was effected must stand to the consequences." Mr. Justice *Littledale* expresses himself as agreeing with the other two Judges.

This is a very recent decision at the Court of King's Bench expressly on this point; but if we look at the circumstances of the present case, I think we may decide this point on the general rule of law, that the principal is responsible for any representations made by his agent relating to the business in hand. For, has not the plaintiff, the assured, made Mr. House his agent for the purpose of this insurance? When Mr. Lye applies to the plaintiff, the plaintiff says, I can give no account; you must go and inquire who was Mr. House's medical attendant. And who could give him the best account? to whom should he go? who could give him direct and satisfactory information on the subject but Mr. House? Then, the assured must have known of the statement signed by Lye, because Lye swears that he showed him the paper, and that the other said, I dare say it is all correct. He either did know it or might have known it,

which, as far as regards his responsibility, is the same thing as if he did know it. He knew that Mr. House had been asked the question — “To what medical practitioner do you refer the directors of the office as most competent to give evidence respecting your present and general state of health and constitution, and your habits of life?” — and that he had answered, “I refer to Mr. Vicary of Warminster.” By suffering that paper to be handed in, he adopts that reference, and makes Mr. House his agent for the purpose of making the reference.

Is that a true and proper reference? Mr. Vicary of Warminster had never been House’s medical attendant. But a medical man at Bath had attended him for some years, and could tell not only whether there was any incipient disease, but whether there were any habits which have a tendency to produce disease.

Without discussing the question whether habits of inveterate drunkenness have a tendency to produce disease or not, we may stop short here, and say, you have not referred to the medical attendant as you were required to do. The first count in the declaration states the policy of insurance; it then states the conditions, according to a clause by which it is “provided that this policy and insurance hereby effected shall at all times and under all circumstances be subject to such conditions and stipulations as are contained in the printed conditions of life-assurance indorsed hereon, in the same manner as if the same were actually repeated in the body of the policy, and adapted to this present case.” One of those conditions is, that the names and residences of two gentlemen are to be referred to respecting the present and general state of the life of the insured — one to be the usual medical attendant of the party. The declaration in the cause then goes on to state, that all the conditions of the policy had been complied with, and, consequently, that there had been a reference to the proper medical man. Without proof of that, the plaintiff could not recover in this action; and it is not an unnecessary allegation, because the declaration, in my opinion, would have been bad without it, for it would not truly have represented the contract between the parties. That contract is not confined to what is contained in the body of the policy, but embraces the conditions indorsed on it, and embraces the representations required by those conditions. It was absolutely necessary to set out in the declaration that these conditions had been complied with. So far from that being proved, undoubtedly it was disproved. I am of opinion, on this short ground, that a nonsuit ought to be entered.

PARK, J. In all actions on life-assurance, I am quite clear that every regard ought to be paid to the assured, because, in general, it is a provision for a family, or it is a provision for a bona fide debt, as I have no doubt it was in this case; for there is not the least imputation on the plaintiff in the cause; but, while one wishes to give every latitude and every indulgence to plaintiffs under such circumstances, it is absolutely necessary that in every case of this description, there should be the purest good faith between the parties, and the most accurate representation of all material circumstances. Looking at this case in that point of view, I think there is nothing at all in the point that has been made. The case is merely this, that Mr. House’s life being the subject of insurance, the plaintiff, who was to be benefited by that insurance, refers the agent of the office to make such inquiries as he can; the agent necessarily goes to the party who was to be the life insured. Was it not, then, of course, that the plaintiff, who made the reference to this very man, because he was the person who could give the best information, should be bound by

the representations House made concerning himself? And what does he say of himself? He is asked to refer to his usual medical attendant. He says, my usual medical attendant is Mr. Vicary of Warminster. But was there a word of truth in Mr. Vicary being his usual attendant? Mr. Vicary was examined, and it appeared he had never been his medical attendant. No matter, then, whether Dr. Harvey were a good medical attendant or not — he was the person actually attending him, and his name was never mentioned. Then, is the plaintiff, who effects the insurance, to be bound by this? It seems to me that *Maynard v. Rhodes* is exactly in point. There is no distinction whatever between that case and the present, because there, the assured was as ignorant of any thing like fraud, and as free from suspicion, as the plaintiff here; yet, it was held, he was bound by the representations of the life insured.

But it is said, this misstatement is not material, or not so material as the misstatement in the case of *Maynard and Rhodes*. I do not agree in that. It is most material that the surgeon who has been in attendance on the life insured, if such a one there be, should be referred to. If he never had had a surgeon attending him, he might have said so; but if he had one, it was material that he should be referred to, and the plaintiff knew it was material, otherwise he would not have declared in the manner he has done in this case, for he avers in his declaration the exact performance of this condition. Instead of alleging that the defendant had dispensed with that information, as, perhaps, he might have alleged, (if he could have proved it,) according to the principle recognized in *Jones v. Barkley*, Dougl. 684, he says, I have performed all the conditions hereinbefore recited. But he had not done so, for he had not referred to the usual medical attendant of the life insured.

BURROUGH, J. Here there is, beyond all question, a misrepresentation of a very material fact; of the name of the person who attended the life insured. There was another person who had been used to attend him. Beyond all doubt, that is a misrepresentation. At the bottom of the policy there is this phrase: "A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such declaration be not in all respects true, the policy will become void." One declaration is of "the name and place of residence of two gentlemen to be referred to respecting the present and general state of health of the life to be insured — one to be the usual medical attendant of the party." Has the plaintiff complied with that? So far from it, there has been a misrepresentation of the fact by the life insured. Vicary was not his medical attendant. There was another person who had attended, and who would have disclosed habitual intoxication. This is not complying with the terms of the policy, and I think there ought to be a nonsuit.

GASELEE, J. According to the terms of this policy, it is requisite that the names and residences of two gentlemen should be referred to respecting the state of the life assured — one the usual medical attendant of the party. Now, who is the person who can best disclose the name of such attendant? and does it not, ex vi termini, almost import that the life assured himself shall be applied to to know who is his medical attendant? Mr. House, the life insured, was the person applied to here, and he has given a misrepresentation of that fact.

But it has been said, he was not the agent of the plaintiff. The plain



tiff said to Lye, Do you make the necessary inquiries, and I will sign the paper. Now, it appears to me, when that is coupled with what passed afterwards, viz., Lye's coming and beginning to read over the declaration, and to state what was in it, when the plaintiff cut him short, and said, he took it for granted it was right, that it does constitute House the agent of the plaintiff, and that he is bound by the misrepresentation of such agent.

That, therefore, appears to me to be a sufficient ground on which a nonsuit ought to be entered in this case. I agree with my brother *Wilde*, that it was competent to the parties to have dispensed with this, or with any other of the conditions they thought fit. But suppose they had, should it not then, on the principle laid down in the case of *Jones v. Barkley*, referring to *Kingston v. Pearson*, have been said, "My declaration consisted of such and such particulars, which were required by the conditions, and I was ready to have declared and to have made it conformable to the policy, but the office did not insist on it; they dispensed with it; and they discharged me altogether from making it;" that is the allegation in *Jones v. Barkley*, where the party said he had made and executed some, and was ready and offered to do the rest, but the other party dispensed with the whole. Then the question would have been, Have they or not discharged them? I do not think my brother *Wilde's* point arises upon the record, or that it would have been competent to give in evidence, that they had dispensed with this condition, requiring the name of the usual medical attendant. On this ground, I am of opinion there should be a nonsuit.

Rule absolute.

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ELLIS v. SCHMÖCK and THOMAS. — p. 521.

The defendants had purchased the scrip of a mining company originated in fraud, and had attended one meeting of the company; but they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after defendants had purchased their scrip:

Held, they were liable.

Action for goods sold and delivered. At the trial, before *Best, C. J.*, London sittings after Trinity term, 1827, it appeared that the goods were furnished for the Cornwall and Devonshire mining company. The defendants had received, from the secretary of the company, certificates of their having paid a deposit upon the amount of their purchase money for certain shares in the company, and had received papers called the scrip of the company, but they had not signed the partnership deed, and had transferred their scrip before the action was commenced.

Both defendants were present at a meeting of the company in August, 1825, but the defendant Thomas had not purchased his scrip until after a portion of the goods, for the price of which this action was brought, had been delivered. It was urged, that as the defendants had parted with their scrip, and had never signed the partnership deed, this action did not lie against them. However, a verdict was given for the plaintiff, and the jury found specially, that the company originated in fraud, but that neither the plaintiff nor the defendants were parties to the fraud.

*Wilde, Serjt.*, moved to set aside this verdict, and enter a nonsuit instead, on the grounds urged at the trial, or to reduce the damages to the amount of the goods furnished subsequently to Thomas's purchasing scrip. A rule nisi was granted, and

*Taddy* and *Spankie*, Serjts., showed cause.

The purchase of the company's scrip, and the attendance at the meeting constituted the defendants partners in the concern, at least, as to third persons, although they never signed the partnership deed. A deed is not essential to a partnership, and the jury have found there was no fraud as between the plaintiff and defendants. *Perring v. Hone*, 4 Bingh. 28, is an authority in point for the plaintiff. In that case, Sir J. Perring was holden to be a partner in a similar company, and as such, incompetent to sue the company, although he had never signed the partnership deed, and had transferred his scrip almost as soon as he purchased it.

In *Vice v. Lady Anson*, 7 B. & C. 409, Lord Anson had attended no meeting, and done no act to participate in the concern. If a man purchase a share of a ship under a bad title, he is, nevertheless, liable as owner, for necessities supplied to the ship.

*Wilde* and *Merewether*, Serjts., contra.

In this case, the mining company having originated in a fraud, to which the defendants were no parties, they did not become partners in the concern. Whether a man be partner or not, must depend on the contract between him and his fellows; and where he is taken in by a fraud, the contract is void, and may be said not to exist for the purpose of binding the parties. In *Nockels v. Crosby*, 3 B. & C. 814, where a scheme for establishing a ton-tine was put forth, stating that the money had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expenses incurred. And as to the supposed case of a ship-owner's liability, *Harrington v. Fry*, 2 Bing. 179, has expressly decided, that a party who purchases a share under an invalid conveyance, is not liable as a part owner. In *Sir J. Perring v. Hone*, the company whose scrip the plaintiff had purchased, was a bona fide concern.

*Cur. adv. vult.*

As several cases of a similar kind were depending in the court of King's Bench, the decision of the court here was postponed; and now, none of those cases having proceeded to judgment,

PARK, J., said, — We have looked into this case, which was argued before my brothers *Burrough*, *Gaslee*, and myself, and are satisfied that the plaintiff must have his judgment. We had thought that a case which is depending in the Court of the King's Bench might have thrown light on the subject, but we are of opinion now that there is no case which immediately touches this. I shall not go into it at any length. We think the jury have by their verdict gone very far to conclude the question; because they find that the defendants form part of a company which was founded indeed in fraud, but they acquit both the defendants and the plaintiff of any cognizance of that fraud. The action was for goods sold and delivered to a very considerable amount, for furnishing the building in which the business of this company was to be carried on. We think that, under all the circumstances of this case, it approaches very nearly, if not quite, to the case of *Sir J. Perring and Others v. Hone*. In that case Sir John Perring had entered his name in a book, with several others, for a projected joint-stock company; he received scrip receipts, but he sold them before the deed was executed for the formation of the company; and he never did execute that deed; but notwithstanding that, inasmuch

as he had attended meetings, and had received moneys, and so forth, the Court was of opinion, upon consideration, that he was still liable. The case of Viscount and Lady *Anson*, we think, does not touch that, because, in the case of that lady, she had certainly received the scrip receipts, and she had, perhaps, in loose conversations in her own family, talked of being a subscriber to the company, though it did not appear that she held herself out to the world in any respect as a partner; and, therefore, that case does not seem to us to apply to the present. In the present case the defendants attended all the meetings, and though they did not in fact sign the deed, that was no more than was urged in the case of Sir John Perring. Under all the circumstances of the case, we think the plaintiff is entitled to keep the verdict.

Judgment for the plaintiff for 234*l.*, the value of the goods furnished after the defendants were concerned with the company.

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### (IN THE EXCHEQUER CHAMBER.)

LLOYD and Others v. SIGOURNEY. — p. 525.

Bill of exchange, drawn in America on a house in London, payable to order, was indorsed by the payee generally to A.; and by him in these words, "Pay to B. or his order for my use." B. applied to his bankers to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of B.: Held, that the indorsement was restrictive; that the property in the bill remained in A.; and that he was entitled to recover the amount from the bankers.

ERROR from the Court of King's Bench, in an action of assumpsit for money had and received, in which judgment had been given for Sigourney, the plaintiff below, on the following special verdict: —

In the month of July, Captain Attwood, who commanded a vessel belonging to the plaintiff below, took in payment of a cargo of flour, the property of the plaintiff, which he sold at Rio Janeiro, a bill of exchange for 3164*l.* 11*s.* 8*d.*, drawn in a set of three, by March, Sealy, Walker, and Co., of that place, on March, Sealy, and Co., of London. This bill was payable to the order of Messrs. Hendricks, Wierss, and Co., who indorsed it to Captain Attwood. The following is a copy of the third part of the bill: —

"Rio de Janeiro, 12th July, 1825.

"For 3164*l.* 11*s.* 8*d.*

At sixty days' sight, pay this third of exchange, first and second not paid, to the order of Messrs. Hendricks, Wierss, and Co., three thousand one hundred and sixty-four pounds, eleven shillings, and eight pence, value of the same, which place to account, as per advice from

"MARCH, SEALY, WALKER, AND CO."

This was indorsed by the payees to A. Attwood; by Attwood to the plaintiff below; by the latter in the following words: —

"Pay to Samuel Williams, Esq., of London, or his order, for my use;"  
And by S. Williams to the defendants below.

Attwood sent the first of the set to the correspondent of the plaintiff below, Mr. Samuel Williams, of London, who was an American agent, and factor for merchants and planters, carrying on such business to a great extent, enclosed in the following letter: — "Sir, — I herewith have the honor to enclose you the first of exchange for 3164*l.* 11*s.* 8*d.* sterling, at sixty days' sight, on Messrs. March, Sealy, and Co., in London, in favor of myself, it being the proceeds of a cargo of flour, in brig Swiftsure, belonging to Henry Sigourney, Esq., Boston, America, which you will please to present for acceptance, and keep at the disposal of the second or third." But he did not indorse the bill. Williams received the letter and bill on the 26th September, 1825, and procured the acceptance of the bill in due course. The third of the set was remitted to the plaintiff below; and he, having indorsed it as aforesaid, "Pay to Mr. Samuel Williams or order, for my use," remitted it to Williams in the following letter of the 17th September, 1825: — "Captain Amaziah Attwood, of my brig Swiftsure, arrived here yesterday from Rio Janeiro. He informs me, that he left a letter directed to you, to be forwarded to you by the next English mail, containing the first of March, Sealy, Walker, and Co.'s draft on March, Sealy, and Co., London, dated 12th July, at sixty days' sight, for 3164*l.* 11*s.* 8*d.* sterling, in favor of Messrs. Hendricks, Wierss, and Co., and by them indorsed to said A. Attwood. He thinks he did not indorse the draft; and if received, it can only be accepted. Enclosed you have third bill of the set, indorsed to me by Captain Attwood, and to yourself by me. I presume that if the other should have been previously received and accepted, a receipt on the one now transmitted would be accepted at maturity. Have the goodness, when you advise the receipt, which I trust will be as soon as possible, of the present, to inform me the standing of the acceptors. Henry Sigourney." The letter and bill were received by Williams on the 26th October, 1825. The defendants below had no notice of the before-mentioned letters of Captain Attwood and of the plaintiff below. Williams stopped payment on the 24th October, 1825, and a docket was struck against him on the 25th of the same month, upon which a commission, dated the 27th of the same month, was issued, and he was declared a bankrupt immediately afterwards. At the time Williams received the bill in question, as well as at the time of his bankruptcy, the balance of account was in favor of the plaintiff below to the amount of upwards of 3000*l.*, exclusive of the before-stated bill. On the morning of the 22d October, when the discount hereinafter mentioned was made, the balance in favor of Williams with the defendants below was 3784*l.* 10*s.* 10*d.* About eleven o'clock on that day Williams indorsed the bill in question, with others, amounting in the whole to 7081*l.* 17*s.* 9*d.*, to the defendants below, who were his bankers, and in the habit of discounting for him very largely, and the said bills were bona fide discounted for him, and credit given to him for the amount, less the discount; and subsequently, viz., at the clearing house about five o'clock in the evening of that day, the defendants below paid Williams's acceptances due that day to the number of thirty-two, and three drafts, amounting to 10,683*l.* 18*s.* 6*d.* The bill in question was honored at maturity, and the amount received by the defendants below on the 28th November, 1825.

*Patteson* for the defendants below. The general rule is, that an indorsement transfers to the indorsee all the rights of the indorser, and, among others, the right of transferring the interest in the bill by indorsement. *Mire v. Manning*, Com. 311; *Acheson v. Fountain*, 1 Str. 557; *Edie v. East India Company*, 2 Burr. 1216. In the latter case, *Wilmot*, J., even intimated a doubt whether there could be a restrictive indorsement. But, conceding that there may, the question is, Whether the indorsement in this case contains clear negative words restraining the negotiability of the bill? The words must be construed most strongly against the plaintiff below, the party using them. First, the bill is indorsed payable to order. *Prima facie*, therefore, it was transferable. The legal title was in Williams, though, as between the plaintiff below and him, he might be bound to hold the bill for the use of the plaintiff below; and if Williams had the legal title he might transfer his interest in the bill by indorsement. In *Snee v. Prescott*, 1 Atk. 247, the language of the bill was, "Pay to my use and order;" not "pay A. B. to my use." The meaning of such an indorsement was considered in *Evans v. Cramlington*, Carth. 5; 2 Vent. 307; Skin. 264; 1 Show. 4: there the bill was payable "to Price or order, for the use of Calvert." Price indorsed it to Evans; after which an extent issued against Calvert, and the money due upon the bill was seized to the use of the king. These facts appearing upon the pleadings, two points were made upon demurrer: the one, whether Calvert had such an interest in the money as might be extended; and the other, whether Price had power to indorse the bill, or whether he had only a bare authority to receive the money for the use of Calvert: and the Court of King's Bench, and afterwards the Exchequer Chamber, held, that Calvert had not such an interest as could be extended, and that Price had power to indorse the bill; and judgment was given for the plaintiff. In the case, as reported in Shower, p. 4, Lord Holt says, "This is a bill which is assignable by Price, and when Price assigned it he received the money, and that receipt was for the use of Calvert; and there Calvert hath his action; but we can take notice of none but Price; and at this rate the credit of bills of exchange will be spoiled." If Calvert's consent had been necessary, that must have been stated in the pleadings to have been given; but there is no such averment. The pleadings are set out in Ventris, p. 308. That case, therefore, is an authority to show that Williams had authority to transfer the interest in the bill in this case. The words "to my use" may be construed as a direction from the plaintiff to Williams, his agent, to apply the bill, or the proceeds of it, to his, the plaintiff's use. The other construction makes the indorsement restrictive. But the intention is not clear; and it ought to be so, in order to restrain the negotiability of the bill. If the first construction be adopted, the defendants below clearly were not bound to see to the application of the money. If the words of the indorsement had been, "which place to my account," or "which hold to my use," the defendants below would not have been bound to look to the application of the money. The party to whom a bill is tendered is not bound to make any inquiry. According to the argument on the other side every subsequent indorsee would be a trustee for the plaintiff below. That would be very inconvenient. In *Evans v. Cramlington*, 1 Show. 4, Lord Holt says, that when Price assigned the bill, and received the money, he became trustee for Calvert. If that be so, then Williams, by indorsing for value to Lloyd, became trustee for the plaintiff below. He could not make the defendants below trustees for the plaintiff below. The reasonable construction of the indorsement is, that it was a direction by the principal to his selected agent to apply the proceeds to his use. If there were any fraud or other suspicious circumstances, the case might have been

different. *Treuttel v. Barandon*, 8 Taunt. 100, proceeded on that ground. And in *Roberts v. Kensington*, 4 Taunt. 30, the sum mentioned in the bill was only to be paid in a certain event specified in the indorsement, of which the acceptors had notice, as they did not accept till after the indorsement. The defendants below applied the money generally, according to the direction of Williams: they could not know in what mode Williams was to apply the money to the use of the plaintiff below. This was a bona fide discount, in the way of trade, to Williams himself. The defendants below were not trustees for the plaintiff below.

*F. Pollock*, for the plaintiff below. The bill belonged to the plaintiff below, and he is entitled to recover its amount from the defendants. The indorsement was special, so as to prevent the indorsee from transferring any interest in the bill beyond the particular purpose or the particular individual mentioned in the indorsement. The earliest case where such a special indorsement is mentioned is *Snee v. Prescott*. There Lord Hardwicke says, "Promissory notes and bills of exchange are frequently indorsed in this manner:—Pray, pay the money to my use, in order to prevent their being filled up with such an indorsement as passes the interest." In *Edie v. The East India Company*, 2 Burr. 1227, *Wilmot, J.*, speaking of an indorser, says, "To be sure, he may give a mere naked authority to a person to receive it for him: he may write upon it, 'Pray, pay the money to my servant, for my use;' or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him, and for his own use. In such case it would be clear that no valuable consideration had been paid him; but, at least, that intention must appear upon the face of the indorsement." It appears, therefore, from these two authorities, that an indorsement in the form used in the present case, will prevent the indorsee from passing the interest in the bill by a subsequent indorsement. The general indorsement of a bill makes it the legal property of the indorsee, and gives him the *jus disponendi*; but an indorsement for the use of another is notice that the property in the bill is in that other, and that the holder is an agent for him, and cannot transfer the bill. *Evans v. Cramlington* only decided that the drawer of a bill, in favour of A. to the use of B., could not, when sued by C., to whom it had been indorsed by A., set up as a defence the rights of B. as a *jus tertii*.

BEST, C. J. We are all of opinion, that the judgment of the Court of King's Bench must be affirmed. Whoever reads the indorsement on this bill of exchange must perceive that its operation is limited, and that the object of the indorser was to prevent the money received in respect of the bill from being applied to the use of any other person than himself: to whomsoever the money might be paid, it would be paid in trust for the indorser; and into whose hands soever the bill travelled, it carried that trust on the face of it. And we see no inconvenience to commercial interests from such a limitation of the effect of the indorsement so expressed; the only result will be, to make parties open their eyes and read before they discount.

It is impossible to read this indorsement without seeing that some inquiry is necessary; for if such be not the use of the words introduced, they are of no use. But if a use can be found for them, the courts must apply them in the way in which they were intended to operate.

The indorser has added the words *or order* to the name of the indorsee, because, if he had not done so, the indorsee must have attended in person to obtain payment of the bill, and the short way to obviate that inconvenience was to introduce the words *or order*. But he still intended

that the person ordered by the indorsee to receive the amount should receive it to the use of him, the indorser.

But the defendants below, instead of paying the amount of the bill for the use of Sigourney, the indorser, have discounted it for the use of Williams, the indorsee. We are all, therefore, of opinion that the judgment of the Court of King's Bench must be  
**Affirmed.**

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JONES v. BRIGHT and Others. — p. 533.

The plaintiff purchased from the warehouse of the defendant, the manufacturer, copper for sheathing a ship. The defendant, who knew the object for which the copper was wanted, said, "I will supply you well."

The copper, in consequence of some intrinsic defect, the cause of which was not proved, having lasted only four months, instead of four years, the average duration of such an article,

Held, in an action on the case in the nature of deceit, that the plaintiff was entitled to damages.

THE tenth count of the declaration stated, that the plaintiff on, &c., at, &c., at the special instance and request of the defendants, bargained with the defendants to buy of them, and the defendants then and there agreed to sell to the plaintiff divers, to wit, 1000, sheets of copper, for the purpose of sheathing the bottom of a certain barque or vessel called the *Isabella*; and the defendants by then and there falsely and fraudulently warranting the said last-mentioned sheets of copper, which had been made and manufactured by the defendants, to be reasonably fit and proper for the purpose last aforesaid, then and there sold the last-mentioned sheets of copper to the plaintiff at and for a large sum of money, to wit, the sum of 313*l.* 3*s.*, which was afterwards paid by the plaintiff to the defendants for the same; whereas, in truth and in fact, the last-mentioned sheets of copper were not at the said time of the said warranty and sale thereof as aforesaid, reasonably fit or proper for the purpose last aforesaid; but, on the contrary thereof, the said last-mentioned sheets of copper were at that time of an inferior quality, and wholly unfit and improper for the purpose last aforesaid; whereby the said last-mentioned sheets of copper, afterwards, to wit, on, &c., at, &c., became and were greatly corroded, injured, and destroyed, and of little or no use or value to the plaintiff; and so the defendants, by means of the said last-mentioned premises, on, &c., at, &c., falsely and fraudulently deceived the plaintiff on the sale of the said last-mentioned sheets of copper as aforesaid. Then followed an allegation of special damage.

The eleventh count differed from the preceding only in omitting the name of the vessel, and the allegation that the copper had been made and manufactured by the defendants.

At the trial, before *Best*, C. J., London sittings after Michaelmas term the case proved was, as follows:—

The plaintiff was a ship-owner; the defendants manufacturers and venders of copper for various purposes.

Fisher, a mutual acquaintance of the parties, introduced them to each other, saying to the defendants, "Mr. Jones is in want of copper for sheathing a vessel, and I have pleasure in recommending him to you, knowing you will sell him a good article;" one of the defendants answered, "Your friend may depend on it, we will supply him well."

Copper was lying in the defendants' warehouse, in sheets of various size, thickness, and weight: the plaintiff's shipwright selected what he thought fit, and afterwards applied it to the plaintiff's ship, observing nothing amiss. The invoice described the article sold as "Copper for the ship *Isabella*." The plaintiff paid the market-price as for copper of the best quality; and his ship proceeded on a voyage to Sierra Leone. The copper, however, instead of lasting four or five years, the usual duration of copper employed in sheathing vessels, was, at the end of four or five months, greatly corroded in patches of holes, and unfit for further service.

Scientific men, called on the part of the plaintiff, ascribed the failure to an oversight or casualty in the manufacture, whereby the copper might have imbibed more oxygen than it ought to contain; but all imputation of fraud on the defendants was disclaimed by the plaintiff. The defendants' witnesses accounted for the corrosion from the singular inveteracy of the barnacles in the river at Sierra Leone, where the ship lay for some time. They stated that the quality of copper might always be known by its appearance and malleability; and that if there had been any defect in that sold to the plaintiff, his shipwright must have discovered it while in the act of sheathing the vessel.

The Chief Justice left it to the jury to determine whether the decay in the copper was occasioned by intrinsic defect or external accident; and if it arose from intrinsic defect, whether such defect were occasioned in the process of manufacture.

The jury found that the decay was occasioned by some intrinsic defect in the quality of the copper; but that there was no satisfactory evidence to show what was the cause of that defect. A verdict was thereupon entered for the plaintiff, subject to an inquiry by an arbitrator as to the amount of damages.

*Ludlow*, Serjt., obtained a rule nisi to set aside the verdict and enter a nonsuit, on the ground, that without an express warranty, or proof of fraud, the defendants were not responsible for the quality of the article they sold.

*Wilde* and *Russell*, Serjts., showed cause. When an article is sold for a particular purpose, a warranty is implied that it is fit for that purpose.

The defendant's copper was sold for the purpose of sheathing a ship; if not adapted to that purpose, it was of no use to the plaintiff: he would only have purchased it, therefore, on the supposition that the defendants undertook it should have the requisite qualities. The rule, *caveat emptor*, applies only where articles are bought in the way of merchandise, and not for any specific use. But good policy requires that the seller should be responsible where he sells an article for a specific use. In many instances, it is impossible that the buyer should, by any degree of care or diligence, be able to ascertain beforehand, whether the article in question will answer the purpose for which it is destined; but the seller has generally the means of knowing this, and of preparing his article accordingly, more especially where, as in the present case, he is the manufacturer. So that, if the position be true with regard to those who merely sell for a particular purpose, it is true a fortiori of those who manufacture and sell. If the defendants had sued for the price of the copper, it would have been an answer to such an action for the plaintiff to have shown that the copper had entirely failed when applied to the purpose for which it was sold. If so, it is but justice that the plaintiff having paid the price, should recover damages if the consideration fails. The result of all the decisions on the subject is, that the rule of *caveat emptor* does not apply where an article is sold for a particular



purpose. Dealings for horses and other animals may easily be distinguished, because, as the animal is not produced by human agency, the seller has no more means than the buyer of guarding against or knowing intrinsic and hidden defects. But the same principle seems to apply in those cases also: for if a horse be sold generally, without any intimation of the particular work to which he is to be applied, the buyer takes him at all risks, and the seller is not responsible unless there be fraud or an express warranty; but if the buyer specifies the purpose for which he wants the horse,—as to drive in a gig, or to carry a child, and it should turn out that the horse had never been in harness, and was unable to draw, or vicious and intractable, the buyer might recover on proof of the animal's inaptitude for the purpose for which he was sold. According to Blackstone, 3 Bl. Com. 161, a presumptive undertaking or assumpsit arises in such cases "from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires." Therefore, in *Living v. Fidgeon*, 6 Taunt. 108, it was held, that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods should be merchantable. And though in *Fisher v. Samuda*, 1 Campb. 190, it was held, a party could not maintain an action on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered; that was, after an action had been brought for the value of the goods furnished at a stipulated price, and the purchaser did not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allowed the seller to recover a verdict for the full price agreed upon.

But in *Gardiner v. Gray*, 4 Campb. 144, where the defendant sold twelve bags of waste silk at 10s. 6d. per pound, which on its arrival was found to be of a quality not saleable under the denomination of waste silk, Lord Ellenborough said, "The purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them." In *Okell v. Smith*, 1 Stark. 108, and *Bluett v. Osborne*, 1 Stark. 384, Lord Ellenborough lays down the same principle, though it should seem that the latter case must be misreported, inasmuch as the decision is apparently at variance with the principle laid down, "A person who sells impliedly warrants that the thing sold shall answer the purpose for which it is sold." In *Pasley v. Freeman*, 3 T. R. 57, Buller, J., said, "It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended." In *Yeats v. Pim*, 2 Marsh. 141, Gibbs, C. J., says, "Where a party undertakes that he will supply goods of a certain description, he must execute his engagement accordingly." It may be presumed from the premature decay, that the whole of the article furnished to the plaintiff was not copper; that there was a mixture of some other ingredient; if so, *Bridge v. Wain*, 1 Stark. 504, is an authority conclusively in favour of the plaintiff. In *Prosser v. Hooper*, 1 B. M. 106, the undertaking of the parties, collected from their acts, was held sufficient to control the words of the contract, from which a warranty would otherwise have been implied; and *Chandelor v. Lopus*, Cro. Jac. 4, does not apply, having merely decided, that in an action on the case for selling, as a bezoar-stone, a stone which was not a

bezoar, it is necessary to allege in the declaration that the defendant knew it not to be a bezoar; but the allegation of knowledge, if necessary in the present case, is implied in the statement that the defendants were the manufacturers of the article supplied. The only cases which can be relied on by the defendants are *Parkinson v. Lee*, 2 East, 314, and *Gray v. Cox*, 4 B. & C. 108. But in *Parkinson v. Lee* the defendants were not the growers of the hops they sold; the hops had been damaged without their knowledge; they were sold from samples fairly drawn, and were equal to the samples; and in *Gray v. Cox* the Court decided simply on the ground, that a warranty of a very extensive kind, alleged in the declaration, was not sustained by the evidence at the trial.

*Ludlow, Serjt., contra.* This is not an action of assumpsit, but an action on the case in the nature of deceit; and the whole current of earlier authorities, confirmed by recent decisions, prove that the plaintiff in such an action must allege and show either an express warranty, or that the defendant knew that the article he sold was not such as he represented it to be. In all other cases the rule of caveat emptor applies. Lord Coke says, "By the civil law every person is bound to warrant the thing that he sells or conveys, although there be no express warranty; but the common law binds him not, unless there be a warranty either in deed or in law; for caveat emptor." (Co. Lit. 102 a.) In the present case, there is no pretence for saying that any express warranty was given; and knowledge on the part of the defendants of any defect in the copper, is neither averred nor proved. In the transaction with the plaintiff, the defendants were the mere sellers of the copper, which lay in their warehouse ready for delivery, and was inspected and chosen by the plaintiff's agent: the circumstance that they were also the manufacturers is a mere accident, which does not affect the case, because the article was not made to order; the allegation, therefore, that they were the manufacturers, is not tantamount to an averment that they knew of the defects in the article they sold from their warehouse; and no authority can be found, in which in an action of deceit a warranty has been implied, without averment and proof of knowledge. In an action on an express warranty, the breach of the warranty is the gravamen, and in such case it is not necessary to allege the scienter, nor, if alleged, to prove it: but in actions on the case, in the nature of deceit, the gravamen is the deceit, and the gist of the action is the scienter. *Williamson v. Allison*, 2 East, 446. In the old writs, sachant is always the material word. 1 Fitz. N. B. 9. And the text books, Statham's Abr., Noy's Maxims, Wood's Instit., lay down the law as settled on that head. Roll. Abr. Act. on Case, p. 90, pl. 1, 2, 3, 4. If an allegation of a warranty in the declaration can be supported by the proof of a contract for the sale of goods for a specific purpose, there is an end of the distinction between implied and express warranties. The scienter need not be proved in any case, since the implied warranty would always be tantamount to an express warranty, and so preclude the necessity of proving the scienter. The only question, therefore, in this case is, Whether the law will, according to the dictum of Lord Tenterden in *Gray v. Cox*, lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him?

If such a doctrine can be maintained, every dealer or manufacturer,—however skillful in the exercise of his art; however careful in the selection of his materials; and however cautious in the language of his contracts,—may be ruined in a moment by the unexpected failure of his commodity. Suppose, for instance, the snapping of a chain-cable holding a valuable East Indiaman, and the consequent loss of the vessel. Is the seller of the cable to be held responsible for the consequences, although it be not shown that it was attributable to his negligence, want of skill, or the use of improper materials? As well may the solicitor under whose instructions the declaration in the cause was prepared be held responsible if it be found unfit or improper for the purpose for which it was intended, although it shall not be proved to have been owing to his want of skill or diligence; or the purchaser of a quack medicine complain that he has been imposed on by an advertisement, which all the world recognises as a puff.

Lord *Tenterden* seems to have been himself aware of the extensive consequences of such a doctrine, when he introduces the word “reasonably,” which appears to have been intended to limit the responsibility to an obligation to provide an article which should be as fit and proper for the purpose for which it was intended as the application of skill, diligence, and prudence in the selection of the materials and in the manufacture could reasonably render it.

All the recent cases, when examined, are in favour of the defendants. In *Yeats v. Pim*, there was an express warranty: the custom of the trade was set up as an answer, but was held insufficient. In *Bridge v. Wain*, the plaintiff recovered on a count stating that he contracted for scarlet cuttings, and that the article supplied was not scarlet cuttings. In *Fisher v. Samuda*, no question arose as to the extent of the warranty; and there, the goods were supplied for exportation, and were never seen by the plaintiff; which appears also to have been the case in *Laing v. Fidgem*. *Gardiner v. Gray* is also an authority in favour of the defendants; for there it was held, that there was no implied warranty that the goods should be equal to the sample exhibited; but the plaintiff recovered, because the article supplied was not that which was described in the contract. The passage cited from *Bluett v. Osborne* is, indeed, *prima facie* in favour of the plaintiff; but Lord *Ellenborough* immediately afterwards says, “In this case the bowsprit was apparently good, and the defendants had an opportunity of inspecting it. No fraud is complained of; but the bowsprit turned out to be defective upon cutting it up. I think the plaintiff is not liable on account of the subsequent failure.” In the present case no fraud is imputed: the copper was apparently good, and the plaintiffs had an opportunity of inspecting it. The defendants, therefore, are not liable on account of the subsequent failure. In *Weall v. King*, 12 East, 452, the declaration averred a contract for stock sheep; and the whole question, as far as warranty was concerned, was upon the custom, as explaining the meaning of the contract. Here the article supplied was sheathing copper; there was no evidence that the customary meaning of sheathing copper was “copper that would last five years;” and the invoice, which alone is evidence of the contract, does not state it to be copper for sheathing. Then *Parkinson v. Lee* is expressly in point; the second count there, averred a promise to supply good, sound, and merchantable hops. The evidence was, that the plaintiff paid a fair market price for merchantable hops; but no express warranty being proved, it was held that the defendant was not responsible for a latent defect in the article. In *Gray v. Cox*, the Court did not sanction the opinion expressed by Lord *Tenterden*.

*Cur. adv. vult.*

BEST, C. J. It is the duty of the Court, in administering the law, to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase; and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied. The Court must decide with a view to such rules, although, upon the present occasion, no fraud has been practised by the parties calling for decision. This is an action against the defendants, to recover damages for the insufficiency of certain copper which they furnished for a particular purpose. It has been asserted that the invoice is the only evidence of such a contract, and that the defendants ought not to be bound by a loose conversation at the time of the sale. An invoice, however, is frequently not sent till long after the contract is completed, and is altogether unlike a broker's note, which does contain the contract between the parties; but if we look at the invoice alone, we see in the present case that the copper was expressly for the ship *Isabella*. However, I do not narrow my judgment to that, but think on the authority of a case not cited at the bar, *Kain v. Old*, 2 B. & C. 634, that "where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination." In that doctrine I entirely concur.

Whatever, then, was not previous discussion, but formed part of the contract, may be taken into consideration. In a contract of this kind, it is not necessary that the seller should say, "I warrant;" it is enough if he says that the article which he sells is fit for a particular purpose. Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said, "Mr. Jones is in want of copper for sheathing a vessel;" and one of the defendants answered, "We will supply him well." As there was no subsequent communication, that constituted a contract, and amounted to a warranty.

But I wish to put the case on a broad principle:—If a man sells an article, he thereby warrants that it is merchantable,—that it is fit for some purpose. This was established in *Laing v. Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise, although there are, doubtless, some dicta to the contrary. Reference has been made to cases on warranties of horses; but there is a great difference between contracts for horses and a warranty of a manufactured article. No prudence can guard against latent defects in a horse; but by providing proper materials, a merchant may guard against defects in manufactured articles; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen; and this distinction explains the case of *Bluett v. Osborne*, in which Lord *Ellenborough* held, that the defendant, who had sold a bowsprit, was not responsible for a failure arising out of a latent defect in the timber.

The decisions, however, touching the sale of horses turn on the same principle. If a man sells a horse generally, he warrants no more than that it is a horse; the buyer puts no question, and perhaps gets the animal the cheaper. But if he asks for a carriage horse, or a horse to carry a female or a timid and infirm rider, he who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that it is fit for the purpose indicated. The selling, upon a demand for a horse with particular qualities, is an affirmation that he possesses those qualities. So

it has been decided, if beer be sold to be consumed at Gibraltar, the sale is an affirmation that it is fit to go so far. Whether or not an article has been sold for a particular purpose, is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. As to the puffs to which allusion has been made, the Court has no wish to encourage them: they are mere traps for buyers; and if a case were to arise out of a contract made under such circumstances, and it were shown that the article puffed was of inferior quality, when asserted to be of the best materials and workmanship, the seller would be bound to take it back, or make compensation in damages.

These principles decide the present case in favor of the plaintiff. After what Lord *Tenterden* had said in *Gray v. Cox*, I declined expressing an opinion at *Nisi Prius*; but I expected the jury would have found that the article was not properly manufactured, for the testimony of the scientific witnesses was very clear; and though the conduct of the defendants was most upright, the article they sold had certainly suffered in the manufacture. At all events, the warranty given by them is not satisfied, because the jury find that there is an intrinsic defect in an article manufactured by them.

Old cases have been cited; and *Chandelour v. Lopus* at the head of them; but that does not bear on the question, because all that the Court decided is, that to render the defendants liable, there must be a warranty or a false representation. But the case does not decide there must be an express warranty; an implied warranty would satisfy the terms of the decision. Here there has been, in my opinion, an express warranty. The most material case is *Parkinson v. Lee*; but the point was not decided there; the Court only decided, that a warranty, that hops sold should be equal to sample, was satisfied by showing that they were equal to sample, although not perfectly good and merchantable. Then the defect complained of was in a product of nature, not of human art, and was unknown to the sellers. That case, too, was decided in 1802, and *Gibbs, C. J.*, cannot be supposed to have been unacquainted with it, when he decided *Laing v. Fidgeon*, in 1815; yet he there decided the point now in dispute, that in every contract to furnish manufactured goods, however low the price, it is an implied term, that the goods should be merchantable.

The law, then, resolves itself into this; — that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose.

In the present case the copper was sold for the purpose of sheathing a ship, and was not fit for that purpose; the verdict for the plaintiff, therefore, must stand: the case is of great importance; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold.

PARK, J. I entertain no opinion adverse to the character of the defendants, because the mischief may have happened by the oversight of those whom they employ; but on the case itself I have no doubt, distinguishing, as I do, between the manufacturer of an article and the mere seller. The count on which the jury have found for the plaintiff states, that the defendants, by falsely and fraudulently warranting that copper which had been manufactured by them was reasonably fit and proper for the purposes

of sheathing the bottom of a vessel, sold the copper to the plaintiff for a large sum of money, whereas the copper was wholly unfit for the purpose, and of little or no use to the plaintiff. Now, independently of the evidence of *Fisher*, which goes to show an express warranty, is there not, where the purchaser cannot judge of the interior of the article, and buys for a particular purpose, an implied warranty, that the article is fit and proper for the purpose for which it is purchased? And it is surely improper that copper, which usually lasts four or five years, should corrode in a single voyage. It has been argued, that in all cases there must be a warranty, or a scienter and fraud. Perhaps so; but till the cause comes to proof, it cannot appear whether the warranty be implied or express; and it will be enough to show that there is an implied warranty, from the nature of the dealing between the parties. In the cases referred to, the point has been decided, to the full extent that the plaintiff requires in this case. The principal object of attack has been the case of *Gray v. Cox*, where Lord *Tenterden* said, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." And this is not to be esteemed an obiter dictum, because the other judges differ from him. It is his judgment formally given, and goes to support the argument for the plaintiff in this cause. The other judges, indeed, only doubted whether the warranty given in evidence supported the warranty laid in the declaration, which was very extensive—a doubt in which Lord *Tenterden* concurred. But if the declaration had been framed in the language of the present, it is probable the evidence in support of it would have been deemed sufficient. In *Fisher v. Samuda*, the plaintiff had paid for the goods after an action had been brought against him for the price, in which he did not, either in bar or reduction of damages, object to the quality of the goods; so that he may be said to have acquiesced in the defect, and the case has no bearing on the present. In *Laing v. Fidgeon* the rule is laid down in the strongest terms; and no man had more knowledge of commercial law than C. J. *Gibbs*. In *Gardiner v. Gray*, Lord *Ellenborough* lays down the same rule, and says, that the principle of caveat emptor does not apply where the buyer has no opportunity of inspection. It has been argued that the plaintiff had inspection here; but it was merely of the exterior of the commodity, and he had no means of knowing its intrinsic qualities. In *Okell v. Smith*, it was laid down that the seller is bound to furnish a commodity that will answer the purpose for which it is sold; and Lord *Ellenborough* said, in *Bluett v. Osborne*, that by selling an article the vendor impliedly warrants it fit for the purpose for which it is sold, and that it is important for the interests of commerce that it should be so. I am, therefore, clearly of opinion, that the verdict for the plaintiff should stand.

BURROUGH, J. I consider this as more a question of fact than of law. The question is, Whether the contract was proved as laid. It was so proved; and, after *Fisher* had introduced the parties, and stated the purpose for which the plaintiff wanted the copper, the defendants warranted the article by undertaking to serve the plaintiff well. The allegation in the declaration, that the copper was manufactured by the defendants, is sufficiently distinct; it is of the very essence of the case, and the plaintiff must have been nonsuited if he had failed to prove it. The declaration states, that the defendants sold, for the sheathing of a

ship, copper which had been manufactured by themselves, and falsely and fraudulently warranted it fit for the purpose. Now, in the case of the *King v. Boyall*, 2 Burr. 832, objection was taken to an indictment against a parishioner for not sending out carts to highway labor, that the allegation touching the order of the surveyors only mentioned them as being surveyors, without adding when and how they were appointed; but Lord *Mansfield* held that *being* was a sufficient reason.

The defendants knew what the copper was wanted for, and made it: and the whole of the tenth count is proved, except the word *fraudulent*, which is not material where it is also expressly stated and proved that the defendants falsely warranted. The copper, instead of lasting four or five years, lasted only one voyage, and this was proved to have been occasioned by a defect in the manufacture.

I cannot comprehend why the action should not lie. I put it on the ground of an express warranty and the finding of the jury that the copper was insufficient, and am of opinion that the verdict for the plaintiff must stand.

GASELEE, J. The case has been so fully gone into, that I shall make only one or two observations. Without inquiring whether the warranty here be express or implied, it is clear that where goods are ordered for a particular purpose, the law implies a warranty that they are fit for that purpose. That was taken for granted in *Fisher v. Samuda*; and though the plaintiff, who complained of the insufficiency of goods sold him, did not recover in that case, that was because he had never objected to the quality of them in an action which had been brought for the price, and had been conducted to judgment against him. It has been argued, that the counts on which the plaintiff has recovered in this case do not state a sufficient contract of warranty. If so, that may be urged in error; but the counts could not easily have been framed otherwise, as it is never clear, on the face of a declaration, whether the warranty to be proved is express or implied.

How far the case might have been altered if the defendants had not manufactured the copper, I do not say; but as to the warranty, the declaration could scarcely have been other than it is. The rule which has been obtained on the part of the defendants must be discharged.

Rule discharged.

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### HUNT v. DE BLAQUIERE. — p. 550.

A husband separated from his wife by a divorce *a mensâ et thoro*, for adultery on his part, with a decree of alimony, is liable for necessities supplied to the wife, if he omit to pay the alimony.

2. Furniture of a house held to be necessities for a female, to whom the Court had decreed 380*l.* a year alimony.

THIS was an action to recover the value of furniture for a house supplied by the plaintiff to the defendant's wife; who had for some years been living separately from her husband under a sentence of divorce *a mensâ et thoro* pronounced on the ground of adultery proved against the husband. As she was the daughter of a marquis, and had brought him a

fortune of 6000*l.*, he was ordered by a decree for alimony to allow her 380*l.* a year for her maintenance. At the trial, before *Best*, C. J., Middlesex sittings after Michaelmas term, it appeared that previously to the separation the lady had been treated with cruelty and turned out of doors. And there was no evidence that more than 695*l.* of the alimony had been paid since the date of the decree, 1820. From that time the defendant had resided in France. The furniture in respect of which the plaintiff sought to recover had been supplied in 1827.

The Chief Justice, after stating that a man who turned his wife out of doors gave her an implied credit for necessaries, directed the jury to consider whether the goods furnished by the plaintiff to defendant's wife were necessary according to her station, and for a style of living not exceeding 380*l.* a year.

The jury found that the defendant had struck his wife and turned her out of doors, and gave a verdict for the whole of the plaintiff's demand, 230*l.*

*Spankie*, Serjt., obtained a rule nisi to set aside this verdict and enter a nonsuit instead, upon the ground that, after the decree for alimony in the spiritual court, the husband was not liable to be sued at common law; and that furniture for a house was not necessary for a divorced wife with an income of 380*l.* a year, who ought rather to live in ready-furnished lodgings.

*Wilde* and *Russell*, Serjts., showed cause.

The divorce a mensâ et thoro, and the decree of alimony, do not, at least unless the alimony be paid, discharge the husband from the implied credit which the wife always has for necessaries. Such a divorce neither constitutes her a feme sole, nor invests her with any of the attributes of a feme sole. She can neither sue nor be sued as such, and there is no alteration in her condition except to justify her in living separate. *Marshall v. Rutton*, 8 T. R. 545; *Ellagh v. Leigh*, 5 T. K. 679; *Lewis v. Lee*, 3 B. & C. 291.

The decree of alimony is for the benefit of the wife, not for the protection of the husband; to give her a remedy direct against him; not to deprive her of the usual credit by which she is to obtain necessaries. If the husband pay the alimony, perhaps he might plead such payment as an answer to any further liability: here he has not paid the amount for a single year. But in *Thompson v. Harvey*, 4 Burr. 2177, it was holden that a pension from the crown would not discharge the husband's liability. In *Manby v. Scott*, 1 Lev. 4, 1 Mod. 124, 1 Sid. 109, the wife had quitted her husband under circumstances of great impropriety, which of themselves would have been sufficient to have discharged his liability; but the decision of the Court turned upon the notice which he had given to the particular creditor who sued. And even *Hyde*, J., who thought the husband not liable, relied mainly on the circumstance that the wife had eloped from her husband, and there was no proof of her repentance. (1 Mod. 132.) "The wife ought to be a penitentiary before the husband is bound to receive her, or give her any maintenance: and no such thing appears or is found in the verdict in our case. If a woman be of so haughty a stomach that she will choose to starve rather than submit and be reconciled to her husband, let her take her own choice: the law is in no default, which doth not provide for such a wife. If a man be taken in execution, and be in prison for debt, neither the plaintiff at whose suit he is arrested nor the sheriff who took him is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others: and if no man will relieve him, let him die in the name



of God, says the law, and so say I. If a woman, who can have no goods of her own to live on, will depart from her husband against his will, and will not submit herself to him, let her live on charity, or starve in the name of God: for in such case the law says her evil demeanor has brought it upon herself, and her death ought to be imputed to her own wilfulness." Where the wife is innocent, the Court always inquires whether the object of alimony or a separate maintenance has been attained; not whether the mere forms have been gone through. *Barrett v. Booty*, 8 Taunt. 343; *Nurse v Craig*, 2 N. R. 153. In the latter case, *Chambre, J.*, says, "Of what use is the covenant for an allowance if the maintenance be not paid?—it does not give a credit to the wife, for no action can be brought against her."

If the husband be liable for necessities, the nature of them must depend on the degree of the parties; *Ozard v. Darnford*, Selw. N. P. 260; and it was a prudent thing on the part of the defendant's wife, rather to purchase furniture for a small house than incur the greater expense of ready-furnished lodgings.

*Spankie and Stephen, Serjts.*, contra. Although a divorce a mensa et thoro does not dissolve the vinculum matrimonii, it gives the husband and wife separate rights, acknowledged as such in the ecclesiastical courts, and distinct characters, which the common law courts are obliged to recognise in various ways. For instance, a woman so divorced cannot be guilty of bigamy, Pr. in Ch. 3; and children born a certain period after the divorce are deemed illegitimate. She is not entitled to administration of her husband's effects, and he can no longer release her rights. *Chamberlaine v. Hewson*, 5 Mod. 70; *Motteram v. Motteram*, 3 Bulstr. 264. By taking a decree, therefore, in the ecclesiastical court, the wife has made her election, and must rely on that as her remedy. Expressum facit cessare tacitum: the implied liability of the husband at common law is merged in his express liability under the decree, and cannot again be resorted to, unless the decree be proved unavailing from the contumacy of the husband. But if the decree be the proper remedy for the wife, the tradesman who supplies her stands in her place, and cannot be in a better condition: he claims only under her, and his course is, through her, to enforce the decree. Upon the strength of that he gives her credit; and unless that be shown to be unavailing, the husband ought not to be harassed by actions. When there is such a decree, it cannot be inferred that the wife is left to starve, unless it be shown that the decree could not be put in force. Besides, she has, at common law, her writ de estoveriis habendis. The decision in *Manby v. Scott* did not turn altogether on the notice to the particular tradesmen; for *Hyde, J.*, thought that the wife ought to have applied to the spiritual court, and altogether disclaimed the husband's liability at common law. (1 Mod. 127, 128, 138.) "If the contract or bargain of the wife, made without the allowance or consent of the husband, shall bind him upon pretence of necessary apparel, it will be in the power of the wife (who, by the law of God and of the land, is put under the power of the husband, and is bound to live in subjection unto him) to rule over her husband, and undo him, maugre his head, and it shall not be in the power of the husband to prevent it. The wife shall be her own carver, and judge of the fitness of her apparel: of the time when it is necessary to have new clothes, and as often as she pleaseth, without asking the advice or allowance of her husband: and is such power suitable to the judgment of Almighty God, inflicted upon woman for being first in the transgression? 'Thy desire shall be to thy husband, and he shall rule over thee.' Will wives depend upon the kindness and favour of their husbands, or be observant towards them, as they

ought to be, if such a power be put into their hands? Admit that in truth the wife wants necessary apparel, woollen and linen, and thereupon she goes into Paternoster-row, to a mercer, and takes up stuff, and makes a contract for necessary clothes; thence goes into Cheapside, and takes up linen there in like manner; and also goes into a third street, and fits herself with ribands and other necessities suitable to her occasions and her husband's degree. This done, she goes away, disposes of the commodities to furnish herself with money to go abroad to Hyde Park, to score at gleeke, or the like. Next morning this good woman goes abroad to some other part of London, makes her necessity and want of apparel known, and takes more wares upon trust, as she had done the day before; after the same manner she goes to a third and a fourth place, and makes new contracts for fresh wares, none of these tradesmen knowing or imagining she was formerly furnished by the other, and each of them seeing and believing her to have great need of the commodity sold her; shall not the husband be chargeable and liable to pay every one of these, if the contract of the wife doth bind him? Certainly, every one of these hath as just cause to sue the husband as the other; and he is as liable to the action of the last as the first or second, if the wife's contract shall bind him; and where this will end no man can divine or foresee. It is objected, that the jury is to judge what is fit for the wife's degree; that they are trusted with the reasonableness of the price, and are to examine the value and also the necessity of the things or apparel. Alas! poor man! what a judicature is set up here to decide the private difference between husband and wife! The wife will have a velvet gown and a satin petticoat, and the husband thinks mohair, or farendon for a gown, and watered tabby for a petticoat is as fashionable and fitter for his quality. The husband says, that a plain lawn gorget, of ten shillings, pleaseth him, and suits best with his condition; the wife will have a Flanders lace, or point handkerchief, of forty pounds, and takes it up at the exchange. A jury of mercers, silkmen, semsters, and exchange-men, are very excellent and very indifferent judges to decide this controversy: it is not for their avail and support to be against the wife, that they may put off their braided wares to the wife, upon trust, at their own price, and then sue the husband for the money. Are not a jury of milliners and drapers bound to favour the mercers or exchange-men to-day, that they may do the like for them to-morrow?"

*Mansfield, C. J.*, was of the same opinion, in *Nurse v. Craig*, and in *Keegan v. Smith*, 5 B. & C. 375. Lord *Tenterden* was of opinion, that after a decree for alimony, an action did not lie against the trustees of the wife.

Then, upon the question of necessities, even if the wife were living with her husband, furniture for a house is one of those greater matters which she could not properly take upon herself without his direct sanction; but when she is living separately, and on a small fortune, it cannot be necessary that she should go to such an expense, when furnished lodgings would suit her circumstances better. But what is necessary in such a case is, in other words, what it is reasonable she should have in her station; and what is reasonable is always a question for the Court. In *Smith v. The Sheriff of Middlesex*, 15 East, 609, the Court thought the furniture of a house not necessities for a married woman living separate from her husband, and adjudged the property therein, as against an execution creditor, to remain in the tradesman who supplied it.

*BEST, C. J.* This was an action to recover the price of household furniture provided by the plaintiff for Lady Harriet de Blaquiére, the wife of the defendant. A verdict was found for the plaintiff, upon which a

motion has been made to set it aside and enter a nonsuit instead on two grounds : First, that a decree of the ecclesiastical court, assigning alimony to Lady Harriet, is an answer to the action ; and, secondly, that the articles supplied were not necessary for a person in her situation.

The jury found that the defendant had stricken his wife, and turned her out of doors.

If a man turns his wife out of doors, it has been said by judge after judge, that he sends her forth with an implied credit for necessaries. This is the general law, and the defendant is liable under it, unless the obligation cast on him by turning his wife out be discharged by something subsequent. It has been asserted that the decree for alimony is a discharge ; but no decision has been cited which can be said to establish that proposition. In *Manby v. Scott*, though some of the opinions of some of the judges seem favorable to such a position, the point decided was far different. That was a case in which necessaries had been furnished to a woman who had eloped from her husband ; — I infer criminally, because the word eloped is never used in any other sense ; — her husband refused to receive her again, and the judges held he was not liable for necessaries. That case has been recognized in subsequent decisions ; and it was again laid down in *Govier v. Hancock*, 6 T. R. 603, that the husband is not liable where the wife deserts him criminally. Undoubtedly in *Manby v. Scott*, some of the judges say that the wife should apply to the ecclesiastical court ; but that such is her only resource is contradicted by all the practice of Westminster Hall, for if it were so, none of the actions which have been brought by tradesmen for necessaries furnished to the wife could have been sustained.

Although we entertain great respect for the opinions of Chief Justice *Hale*, the answer given by Mr. Justice *Twisden* is conclusive — “ Is the wife to starve ? ” and it is not necessary in such a case to imply agency on the part of the wife : the husband is at all events liable : this we might lay down on principle, even if there were no decision on the point. But *Nurse v. Craig* is an express authority ; and the opinion of the three judges in that case is confirmed by *Gibbs*, C. J., and the rest of the Court in *Barrett v. Booty*. But it has been argued that by taking the decree in the ecclesiastical court, the wife makes her election ; and so she does where she accepts a provision for a separate maintenance, as in *Nurse v. Craig*. But it is not the decree or the deed that discharges the husband, but the observance of it. There never was a case in which such an argument could be adduced with less plausibility than in the present. It has been said, indeed, the husband is only liable when shown to be contumacious ; but if he be ordered to pay alimony on a particular day, he is contumacious as soon as he omits to pay at the appointed time. The ecclesiastical court orders the defendant in 1820 to pay his wife 380*l.* a year (only 80*l.* a year beyond her own fortune,) and in 1829 he had paid altogether no more than 695*l.* As to the writ *de estoveriis habendis*, the wife's being entitled to that does not carry the matter further than her right to sue in the ecclesiastical court. The tradesman has still his action, for he cannot compel her to sue. I am therefore of opinion, that the defendant is not discharged from his liability. Whether the articles furnished by the plaintiff were necessaries, was a question for the jury. I put it to them whether, with an income of 380*l.* a year, it was fit that the defendant's wife, the daughter of a marquis, should hire a house, or whether she was bound to live in furnished lodgings. They thought it

not proper that a person in her station should be compelled to live in lodgings; and I am satisfied with their verdict.

PARK, J. I concur in the opinion which has been given. The question is, Whether a deed of separate maintenance, or a decree for alimony, will discharge a husband from liability, when the sum secured by the deed or decree is not paid; and I am of opinion it will not. The defendant forced his wife from his house, with circumstances of cruelty; he was divorced from her for adultery committed by himself; and he has complied very little with the decree for alimony. But he is bound to provide for his wife; and all the cases show that the alimony must not only be secured, but paid. In this the text writers all concur. *Bacon's Abridgment*, 488, contains the whole of the judgment of *Hale, C. J.*, in *Manby v. Scott*, and the summary which the learned compiler extracts from it is as follows:—

“It is clear that a husband is obliged to maintain his wife, and may by law be compelled to find her necessaries, as meat, drink, clothes, physic, &c., suitable to the husband's degree, estate, or circumstances. It seems also settled, that the wife is not to be her own carver, and that she hath not an absolute power of binding the husband by any contract of hers, though for necessaries, without his assent precedent or subsequent. The law, therefore, in these cases, as it seems established by usage and practice, is to leave it to the jury to find whether the husband consented or not; and though no express consent or agreement of his be proved, yet if it appears that she cohabited with her husband, and bought necessaries for herself, children, or family, the husband shall be chargeable, and the jury may find, on their oaths, that they came to the husband's use, he being by law obliged to provide for them; also, if she cohabits with her husband, and is ever so lewd, he shall be liable for her necessaries, for he took her for better for worse; so if he runs away from her, or turns her away, or forces her by cruelty or ill usage to go away from him; but if he allows her a separate maintenance, or prohibits particular persons from trusting her, he shall not be liable during the time that he pays such separate maintenance, nor for necessaries taken up of those persons particularly prohibited; for in these cases no consent, but rather the contrary, appears; but a general warning or notice in the Gazette, or other newspaper, not to trust her, is not a sufficient prohibition; also the jury are to determine as to the wife's necessity, the husband's degree and circumstances, and the value of the things sold and delivered, and give a verdict and assess damages accordingly.”

I do not feel it necessary to differ from the decision in *Manby v. Scott*. There, the wife eloped, lived away several years, and the husband refused to receive her again; and *Hyde, J.*, refers to the case of the Prodigal Son; so that it is clear the wife had been living improperly. In *Nurse v. Craig*, it is true, the judges did not all agree; but the opinion of *Heath, J.*, is the more important, as he had originally thought differently; and *Chambre, J.*, puts the case expressly on the ground that the separate maintenance had not been paid. He says, “If reason, justice, or humanity ought to govern in the present case, I think it my duty to consent to the allowance of this action, since all the reasons upon which exceptions to this kind of action have been founded, totally fail in the present instance.”

No distinction can be drawn between maintenance under a separation deed, and maintenance by virtue of a decree for alimony. It has been

urged, indeed, that the wife should enforce the decree of the ecclesiastical court ; but, in order to do that, she must first obtain money, and it would be difficult to execute a writ de excommunicato capiendo while the husband is in a foreign country. *Nurse v. Craig*, therefore, is a much stronger case than the present, because the trustee might have sued for the allowance. Perhaps a jury would not be permitted to say whether or not the allowance was sufficient ; but whether or not articles supplied are necessary, is a question within their province. *Keegan v. Smith* has no bearing on the subject of discussion ; for the wife must starve unless we decide in favor of the plaintiff. No answer has been given to *Ozard v. Darnford*, where Lord *Mansfield* expressly draws the distinction between an allowance agreed for and an allowance paid. In his charge to the jury in that case, he laid it down as clear and decided law, “ that when husband and wife live together, the husband is liable for all such necessities wherewith the wife may have been furnished ; but that what are or are not necessities must depend on the rank and situation of the husband ; that where they live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her ; and the spiritual court, or court of equity, will compel him to grant her an adequate alimony. But if she elope from her husband, and live in adultery — or if, upon separation, the husband agrees to make her a sufficient allowance, and pays it — in either of those cases the husband is not liable ; because in the former case she forfeits all title to alimony, and, in the latter, has no further demands on her husband. And as in all cases the creditor is to be considered as standing in the wife’s place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation ; for, in such cases, he must trust her at his peril.”

In a similar case of *Turner v. Winter*, Selw. N. P. 260, his Lordship nonsuited the plaintiff, because, on separation, the defendant had agreed to make an allowance to his wife, and had regularly paid it, notwithstanding the plaintiff had no notice of the transaction. But the allowance must be sufficient, according to the degree and circumstances of the husband ; and the adequacy of the allowance is a question of fact for the jury. *Hodgkinson v. Fletcher*, 4 Camp. 70.

BURROUGH, J. Tradesmen must look to the circumstances of the wife, and of her separation from her husband. If the husband turns her out of doors, he is liable for necessities ; if she elopes, she can claim neither maintenance nor dower. Here there is no imputation on the wife : the husband beats and turns her out of doors, and all the wrong is on his side : he is ordered to pay alimony, and now attempts to avail himself of his own wrong, and because he omits to pay the alimony, refuses to pay the tradesman. To permit him to act in such a way would be contrary to all principle. The writ de estoveriis habendis is only in lieu of alimony, and does not affect the right of the tradesman to sue, — or all the practice of Westminster Hall is wrong. The husband is not discharged unless he pay the alimony or separate maintenance ; and there is no difference whether the provision be by deed or decree. As to the objection that the articles supplied were not necessities, the defendant’s wife must have a house to live in, and if so, could not dispense with tables and chairs. It was incumbent on the defendant to show that he had paid the alimony, and not on the plaintiff to show that it was unpaid.

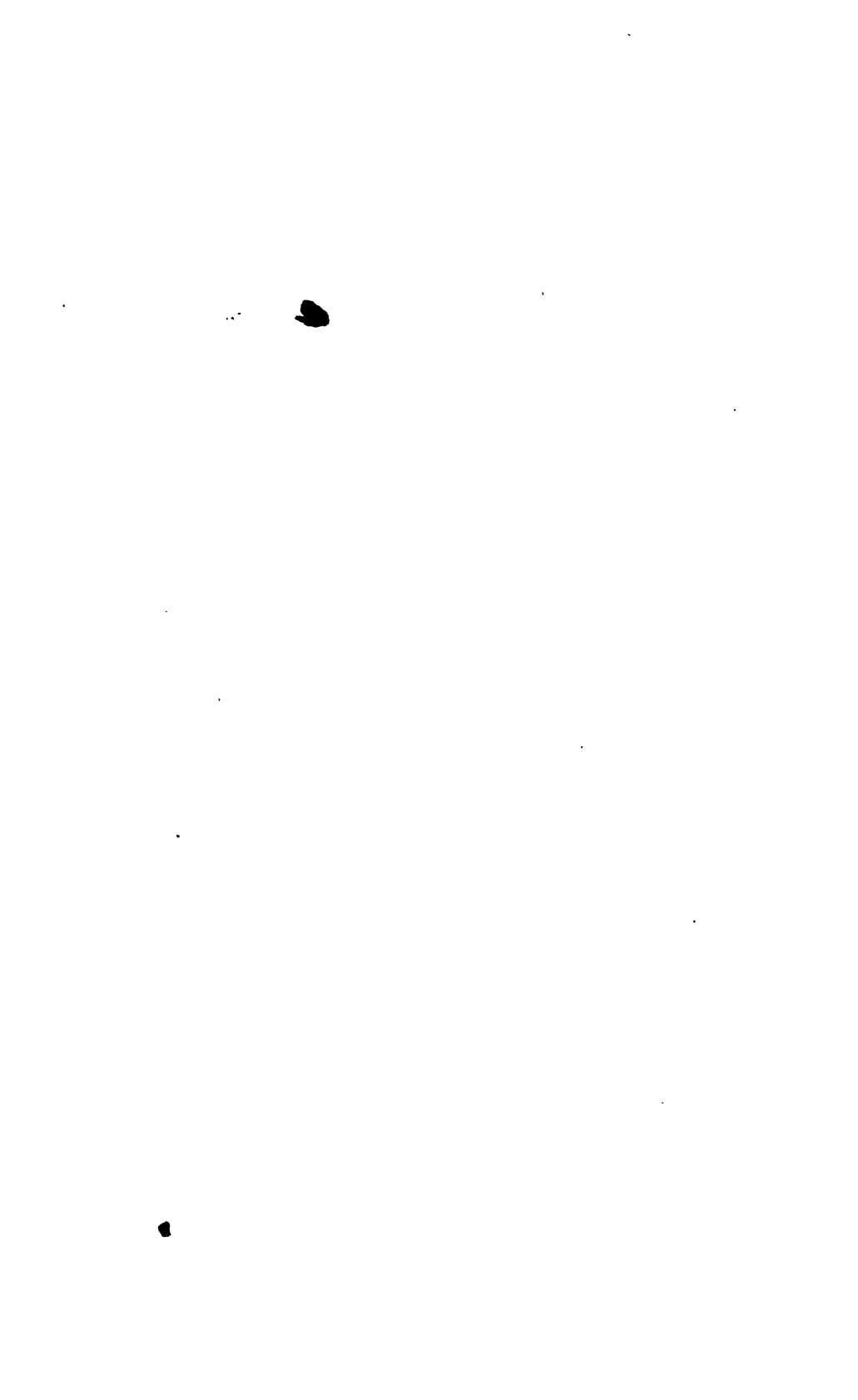
GASELEE, J. There is no case in which the wife has been precluded from obtaining credit for necessities where the husband has turned her out of doors, or has so conducted himself that a decent woman could not remain with him. On the contrary, in *Ozard v. Darnford*, Lord Mansfield says, "In all cases the creditor is to be considered as standing in the wife's place. It imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for in such cases he must trust her at his peril."

In deciding thus, we shall not, as it has been argued, go beyond the decision in *Nurse v. Craig*; because if the objection to the form of action in that case had prevailed, I should still say that an action would lie.

The rule for a nonsuit must be

Discharged.

END OF EASTER TERM.



# AN INDEX

TO

*Galloway*

## THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

### ACTION ON THE CASE.

1. An individual who has suffered loss in consequence of the decay of sea-walls which a corporation is directed to repair under the terms of a grant from the crown conveying a borough, and pier or quay with tolls, to the corporation, may sue the corporation for damages. *Henley v. The Mayor and Burgesses of Lyme.* Page 91
2. F. who had hired a ship and its tackle of the plaintiff for three voyages, at the end of the first being apprehensive of a seizure, under the process of an admiralty court, placed the cables and anchors on the defendant's wharf, alongside of which the ship lay. The ship was then seized for seamen's wages and a debt on bottomry, and shortly afterwards was sold under admiralty process without the anchors and cables. Two days before the sale, the plaintiff demanded of the defendant the anchors and cables on his wharf, which the defendant, holding them from F., refused to give up:

Held, that on this demand, previous to the sale, the plaintiff could not sue the defendant for the anchors and cables in trover, although they had not been removed out of the ship in the ordinary course of business: Held, also, that the removal of them from the ship to the wharf, whereby they escaped the admiralty sale, was no injury to the plaintiff's reversionary interest. *Ferguson v. Christal and Another.* 305

3. The plaintiff purchased from the warehouse of the defendant, the manufacturer, copper for sheathing a ship. The defendant who knew the object for which the copper was wanted, said, "I will supply you well."

The copper, in consequence of some intrinsic defect, the cause of which was not proved, having lasted only four months, instead of four years, the average duration of such an article:

Held, in an action on the case, in the nature of deceit, that the plaintiff was entitled to damages. *Jones v. Bright.* 533

### AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 8.

### AGENT.

See EVIDENCE, 3.

### ALLUVIAL LAND.

Land, not suddenly derelict, but formed by alluvion of the sea, imperceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown. *Sir Robert Gifford v. Lord Yarborough.* 163

### AMENDMENT.

See PLEADING, 7. PRACTICE, 10.

### ASSUMPSIT.

1. A written agreement, "to remain with A. B. two years for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument by A. B. to teach. *Lees v. Whitcomb.* 34
2. A child at school, for whom payment had been made quarterly, was sent home for illness four days after the commencement of a quarter, and did not return: Held, that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice or a quarter's pay, and although the school was a day school, at which the child was the only boarder. *Collins v. Price.* 132

### AWARD.

See PRACTICE, 4.

1. The objections against an award ought to be specified in a rule nisi obtained for the purpose of setting it aside: but an omission in that respect is not conclusive to preclude the court from entertaining the objections.
2. Upon a declaration of eleven special counts for negligence, and common counts for money paid, &c., an arbitrator, under an order of *Nisi Prius*, found that the plaintiff had "good cause of action for 23l. 14s.



10d.," and directed a verdict to be entered up for that sum: Held, sufficiently certain. *Dicas v. Jay.* 128

### BAIL-BOND.

See PLEADING, 2, 5.

### BANKER'S BOOK.

See EVIDENCE, 4.

### BANKRUPT

1. The Court of C. has not authority under the 6 G. 4, c. 16, s. 96, to compel parties to enrol the proceedings under a commission of bankrupt. The application must be made to the Court of Chancery. *Johnson v. Gillett.* 5
2. Bankruptcy and certificate are no bar to an action *in tort* against a broker for selling out plaintiff's stock contrary to orders. *Parker v. Croll.* 63
3. By charter-party B. hired a ship to convey a cargo to Hayti, and engaged to find a cargo for the homeward voyage. On the ship's arrival at Hayti, B. assigned the cargo to C. as a security for advances made by him. The hire of the ship not having been paid, defendants, the owners, under the judgment of a court at Hayti, attached the cargo in the hands of C. to discharge defendants' claim for the hire. B. having declined to find a cargo for the homeward voyage, the captain procured one for defendants, who received the freight on its arrival in London; B. having, subsequently to the said assignment, become bankrupt, Held, that his assignees could not recover from defendants the proceeds of the cargo attached at Hayti, or of the homeward freight. *Kymer and Others, Assignees, v. Larkin and Another.* 71
4. 1. A payment made in June 1825 by a debtor, *bonâ fide*, without intention of fraudulent preference, eight days before a commission of bankrupt was issued against him, Held to be protected under the eighty-second section of 6 G. 4, c. 16.  
2. The debtor, a prisoner, went eight days before a commission of bankrupt was sued out against him, to a fire-office, to receive money, payable to him in respect of a loss by fire; a creditor, for labour done, who knew the time when the money was to be paid, without any intimation from the debtor, met him at the office, and obtained out of the sum so received a payment of his own debt, not knowing that his debtor was a prisoner or insolvent; a jury having negatived fraud, Held, that this was not a fraudulent preference by the debtor. *Churchill and Another, Assignees of Cadogan, a Bankrupt, v. Cress.* 177
5. A chariot was built to plaintiff's order, and paid for by him; when finished in other respects, plaintiff ordered a front seat to be added; but the builder being slow in making this addition, plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. Plaintiff being afterwards dissatisfied, ordered the chariot to be sold, and

while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignee seized the chariot. More than three months afterwards the plaintiff commenced his action:

Held, first, that the plaintiff had sufficient property to maintain *trouver*; secondly, that the chariot did not pass to the assignee as being in the order and disposition of the bankrupt with the consent of the owner; and thirdly, that the assignee was not within the protection of the forty-fourth section of 6 G. 4, c. 16, which limits actions to three months after the fact committed. *Carruthers v. Payne, Assignees of Thomson, a Bankrupt.* 270

6. The bankrupt act, 6 G. 4, c. 16, s. 82, is retrospective.

Therefore, where the bankruptcy took place June 26, 1822, and the bankrupt paid the defendant, who knew of his insolvency, a sum of money August 4, 1822, and a commission was sued out against the bankrupt in May 1823: Held, that the assignees could not, subsequently to the time when the 6 G. 4, c. 16, came into operation, sue the defendant for money had and received. *Terrington, Assignee of Pullan, a bankrupt, v. Hargreaves and Others.* 489

### BARON AND FEME.

1. A husband, who supplies his wife with necessaries in her degree, is not liable for debts contracted by her without his previous authority or subsequent sanction. *Seaton v. Benedict.* 28
2. Where a plaintiff furnished defendant's wife with articles of dress, which were rendered unnecessary by the defendant's having supplied her wardrobe amply, and in an action for the price of the articles (18l. 5s. 6d.) the jury found a verdict for plaintiff, damages 10s. the Judge certified to deprive him of costs. *Seaton v. Benedict.* 187
3. 1. A husband separated from his wife, and a divorce, *a mensâ et thoro*, for adultery on his part, with a decree of alimony, is liable for necessaries supplied to the wife, if he omit to pay the alimony.  
2. Furniture of a house held to be necessaries for a female, to whom the Court had decreed 380l. a year alimony. *Hunt v. De Blaquiere.* 550

### BILL OF EXCHANGE.

1. Defendant accepted a bill of exchange drawn by C., who indorsed it to his bankers; they entered it on the credit side of C.'s account, but the bill having been dishonoured, entered it afterwards on the debit side. A few days after the dishonour, defendant paid to C. the amount of the bill, but omitted to take it out of the banker's hands.  
C. subsequently paid into the banker on his general account more than enough to cover all the items of the account preceding the bill item, and that item also, and the

bankers, for a space of three years, treated the bill as paid; they then sued defendant on his acceptance:

Held, that he was not liable. *Field and Others v. Carr.* 13

2. A bill of exchange, drawn in America on a house in London, payable to order, was endorsed by the payee generally to A., and by him in these words: "Pay to B., or his order, for my use." B. applied to his bankers to discount the bill, and they, without making any inquiry, did so and applied the proceeds to the use of B.:

Held, that the indorsement was restrictive; that the property in the bill remained in A., and that he was entitled to recover the amount from the bankers. *Lloyd and Others v. Sigourney.* 525

## BOSTON ACT.

See EVIDENCE, 7.

## BY-LAW.

1. In a company constituted by letters-patent, with power to make reasonable by-laws, a by-law for the steward to provide a dinner for certain members of the company on Lord Mayor's day, with an allowance for doing so, or to pay a fine of 20*l.*, or excuse himself by swearing he is not worth 300*l.*, is a bad by-law. At all events,
2. The allowance is a condition precedent, and ought to be averred. *Carter and Others v. Sanderson.* 79

## CARRIER.

1. A notice that the proprietor of a general coach-offices will not be responsible for the carriage of parcels of more than 5*l.* value, unless entered as such, will not avail the proprietor of a coach who takes a parcel from the office, unless it be otherwise shown that he is connected with the office.
2. The carrier's agent telling the female servant of the owner of a parcel above that value, that it ought to be insured: Held, not a sufficient notice of the limitation of the carrier's responsibility. *Macklin v. Waterhouse and Others.* 212
2. *Semble*, That where carriers run a coach from A. to B. and back, notice that they limit their responsibility on the carriage of parcels from A. to B., is notice that they limit it likewise from B. to A. *Riley and Others v. Horns and Others.* 217

## CERTIFICATE.

See BANKRUPT, 2.

## CHAMPERTY.

An agreement between the seller and purchaser of an estate, that the purchaser, bearing the expense of certain suits commenced by the seller against an occupier for arrears of rent, should have the rent to be so recovered, and any sum that could be recovered for dilapidations; and that the purchaser, bearing the expenses, might use the seller's name in actions he may think fit to commence against the occupier for

arrears of rent or dilapidations, is not void, as savouring of champerty. *Williams v. Protheros.* 309

## COMPOSITION-DEED.

1. Plaintiff had refused to sign an agreement to receive of his debtor a composition of 10*s.* in the pound; but the debtor's brother offering to supply him with coal to the amount of the other 10*s.*, he signed the composition-agreement.

The other creditors knew nothing of the coal transaction.

Plaintiff having been supplied with the coals,

Held, that he could not recover upon a promissory note for the amount of the 10*s.* composition. *Knight v. Hunt.* 432

2. Plaintiff, holding two bills drawn by defendant, one for 400*l.*, the other for 156*l.* 19*s.* 10*d.*, executed a composition-deed, containing a general release of the defendant, and a schedule of the sums due to various creditors who executed the deed. After the plaintiff's name was put the sum of 156*l.* 19*s.* 10*d.* only, at the request of the defendant, who expected the plaintiff would recover the bill for 400*l.* by suing the acceptor. The other creditors were not made acquainted with the fact, that the plaintiff had a debt of 400*l.* as well as 156*l.* 19*s.* 10*d.*:

Held, he could not afterwards sue defendant on the bill for 400*l.*

*Gaseles, J., dissents.* *Britten and Others v. Hughes.* 460

## CONFIRMATION.

See CROSS REMAINDER, 2.

## CONVEYANCE.

See MORTGAGE, 2, 1, 2.

Where commissioners, under an inclosure, made an allotment in respect of R.'s land in 1824, Held, that the allotment passed by a subsequent conveyance of the land in 1824, although the commissioners' award was not executed till 1827. *Doz dem. Dixon and Another v. Willis and Another.* 441

## COSTS.

See PRACTICE, 3. MORTGAGE, 2, 1.

1. Arrest for 100*l.* Verdict for plaintiff, subject to an award; costs to abide the event: 39*l.* 18*s.* found to be due, and the transactions between the parties, complicated. The Court refused to allow the defendant his costs under 43 G. 3. *Turner and Another v. Prince.* 191
2. Trespass *qu. cl. fr.*; pleas, not guilty, and justifications under a right of way. Issue joined on not guilty; right of way traversed, and issue joined thereon. New assignment and judgment by default thereon. Verdict for plaintiff 1*s.*, on issue of not guilty; 40*s.* damages on the new assignment; verdict for defendant, on one of the justifications:

Held, that the plaintiff was entitled to the

general costs in the cause. *Vickers v. Gallimore*. 196

### CROSS-REMAINDER.

1. Where, by a very obscure and illiterate will, property was left to deviser's four grandsons, "and to the heirs males of the said grandsons, and then to the grandsons' heirs males that part that belonged to their father, and then to the last liver to the heirs males of the said grandsons and for want of issues males of the grandsons," over; the court implied cross-remainders.
2. The heir in tail received for 10 years' rent under a lease for ninety-nine years granted by his ancestor: Held, a confirmation of the lease. *Doe dem. Southouse v. Jenkins and Another*. 469

### CUSTOM.

See TOLL.

### CUSTOM ECCLESIASTICAL.

See EVIDENCE, 8.

### DEED.

See EVIDENCE, 2, 2.

1. The defendant executed a deed, conveying his property to trustees to sell for the benefit of the creditors, the particulars of whose demand were stated in the deed; a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the blank the next day, in the defendant's presence, and with his assent. He afterwards recognised the deed as valid in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to inure to the uses of the deed: Held, that the deed was valid, notwithstanding the filling up of the blank after execution.
2. The attorney who had prepared the deed, on the retainer of the trustees, who held a competent witness in an issue directed by the Court to try its validity, although one of the trusts was to defray the charges of preparing the deed, and although he was defendant in another action, his success in which depended on the validity of the deed. At all events, in such an issue, the defendant was held not entitled to a new trial, on account of the admission of the testimony of such witness, justice having been done. *Hudson v. Revett*. 368

### DEMURRAGE.

See SHIPPING.

### DEVISE.

1. Devise to J. H. L. (deviser's eldest son) for life; remainder to trustees to preserve, &c.; remainder to J. H. L.'s second, third, fourth, fifth and all and every other the son and sons of the body of J. H. L. severally and successively in seniority of age in tail male; remainder to deviser's second and other sons successively in tail male; remainder to first and

other daughters of the body of J. H. L. successively in tail general; remainder to deviser's eldest daughter, M. S. L., for life; remainder to trustees to preserve, &c.; remainder to her first and other sons successively in tail male; remainder to her first and other daughters successively in tail general; like remainders for life (with remainder to trustees to preserve, &c.) to deviser's other daughters successively, with like remainders in tail to their respective children; remainder to deviser's sister in fee; various terms to trustees to raise money; and a power to the party in possession of the premises devised, to charge them for the portions and maintenance of younger children, male and female, accompanied with a provision, that in case of any younger child's obtaining a portion and afterwards becoming entitled to the premises devised, the portion of such younger child should go over to the other younger children: Held, that the eldest son of J. H. L. took an estate tail in the premises expectant on the death of J. H. L. *Langston v. Pels and Others*. 228

2. Devise, that J. B., a trustee for deviser, shall grant the premises to J. B.'s son G. B., to enter on after the death of J. B., and that J. B. and G. B. shall within one month after deviser's decease pay 100*l.* to W. T. and T. B. discharge legacies; and if they omit to do so, that W. T. and T. B. shall let the premises and raise the 100*l.* out of the rent, they keeping the deeds of the premises, and not allowing J. B. and G. B. to sell or mortgage till the legacies be paid and G. B. be twenty-one years of age; and that if G. B. die and leave no child lawfully begotten of his own body, W. T. and T. B. shall sell the premises and divide the proceeds among brothers, &c.; Held, an estate tail in G. B. *Raggett v. Beatty*. 243

### DISTRESS.

See LANDLORD AND TENANT, 3.

1. A landlord, to whom rent was in arrear, hearing his tenant and a stranger disputing about the property of an article on the premises, early in the morning entered and said, "The article shall not be removed till my rent is paid." The stranger, nevertheless, removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent; Held, that the distress was sufficiently commenced by the landlord to entitle him to the article in question. *Wood v. Nunn*. 10

2. Avowant, who had a term which expired on the 11th of November, 1826, let the premises orally from the 11th of September to the 11th of November in that year, for 270*l.*, payable immediately:

Held, that this was a lease, of which parol evidence might be given, and not an assignment requiring a writing; but that being a demise of the whole of avowant's interest, he had no right to distrain. *Prosser v. Corrie*. 24

3. A tenant distrained on for rent requested

the broker not to proceed to sale, and engaged, in consideration of forbearance, to pay the broker's charges. Time was given, and the charges paid: Held, that this was not a voluntary payment, and that the charges, if irregular, might be recovered back in an action for money had and received. *Hills v. Street*. 37

### DUCHY OF LANCASTER.

Although the Duchy of Lancaster is held by the King separately from his crown, a grant of duchy property is subject to the same incidents as a grant from the crown.

Therefore, an immediate grant to A. in fee, under the duchy seal, of property which was in the possession of B. under an unexpired lease from the duchy for years (such lease not being recited in the grant), was held void, notwithstanding there had been a user under the grant from the date of it (1631) to 1760. *Alcock v. Cooks and Another*. 340

### EJECTMENT.

See EJECT, 2. MORTGAGE, 1.

### ELEGIT.

1. Where two *elegits* are issued the same day upon judgments signed in the same term, the sheriff may extend on each an entire moiety of the defendant's land, although the judgments are at the suit of different plaintiffs, and the inquisition on the second *elegit* recites, that a moiety has been extended on the first.
2. Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessor of the plaintiff. *Doe d. Davies v. Creed*. *Doe d. Davies and Chesse v. Creed*. 327

### ENCLOSURE ACT.

See CONVEYANCE.

### EVIDENCE.

See DEED, 2. LIMITATIONS. PLEADING, 4. TOLL, 2. DUCHY OF LANCASTER.

1. In an action between A. and B., the Court refused a rule to compel B. to produce, for the purpose of stamping, an agreement between B. and C., although by an affidavit of C.'s it appeared that the act complained of by A. arose out of this agreement. *Lawrence v. Hooker*. 6
2. 1. Where a bishop has omitted to present to a living lapsed to him for want of presentation within six months, a party who may present if the bishop omits to do so is not a competent witness for one who claims in the same right as such party.  
2. A conveyance of a fourth part of an advowson in 1672, is not to be deemed voluntary, because the only pecuniary consideration expressed in the deed is twenty shillings.  
3. An answer in Chancery, touching an advowson, filed by one who had been seised

of the advowson twenty years after he had conveyed it away, Held, not admissible in evidence against a party who claimed the advowson through him. *Gully and Others v. Bishop of Exeter and Dowling*. 171

3. Defendants' agents abroad, by order of defendants, received money on defendants' account, and stated the fact in a letter to defendants. Defendants replied, acknowledging the receipt of the agents' letter, and giving them directions as to the disposition of the money:

*Held*, that the agent's letter was, coupled with the defendants', admissible in evidence to charge the defendants with the receipt of the money. *Coates and Another, Assignees, v. Bainbridge and Others*. 58

4. A banker's ledger is receivable in evidence to show that a customer had no funds in the banker's hands. *Furness, Assignee of Alexander Cope and Others, Bankrupts, v. William Cope*. 114

5. *Quare*, Whether, in an action for an injury to the reversion, the fact that an occupier holds as tenant to plaintiff may be proved by oral evidence, where the occupier holds under a written agreement.

*Best, C. J., and Burrough, J., neg.; Parks, J., and Gaselee, J., aff. Strother and Another v. Barr and Another*. 136

6. Where a party sues on an instrument which on the face of it appears to have been altered, it is for him to show that the alteration has not been improperly made. *Henman v. Dickinson*. 183

7. 1. *Semble*, That a postmark may be proved by any one in the habit of receiving letters by the post.

2. An action to recover the balance of an account is not within the Boston Court of Conscience Act, if the account originally exceeded 5*l.*, although the sum sought to be recovered is less than 5*l.* *Abbey Lill*. 299

8. 1. A bishop's register is evidence of the facts stated in it.

2. An allegation of a custom in *parishioners* to elect a curate is not supported by proof of such a custom in parishioners paying church-rates.

3. *Semble*, An ecclesiastical custom (which is not immemorial) will not, though acted on for a long time, deprive a rector of his common-law right to appoint his curate. *Arnold, Clerk, and Others v. Bishop of Bath and Wells and Others*. 316

9. Where defendant surreptitiously obtained possession of an unstamped agreement executed by himself and the plaintiff (thereby preventing the plaintiff from affixing a stamp, as he had intended, in twenty-one days after execution), and then swore that he had lost the agreement, the Court ordered that he should produce a copy in his possession to the plaintiff; and that if the plaintiff produced that copy stamped at the trial, the defendant should be precluded from producing the original. *Bousfield and Others v. Godfrey*. 418

10. 1. Where one of the attesting witnesses

to a will is dead, witnesses may be called to his character.

2. Declarations of the testator in subversion of a will are not admissible in evidence, though both parties claim under him, and though they are offered with a view to show the manner in which the will was executed. *Provis and Rows v. Read.* 435
11. Where the plaintiff, in an action on a charter-party, had communicated to the attesting witness an interest in the adventure subsequently to the execution of the instrument: *Held*, that evidence of his handwriting was inadmissible. *Hovill v. Stephenson.* 493

#### EXECUTOR.

*See* PLEADING, 6.

#### EXECUTION.

*See* ELEGIT, PRACTICE, 1, 2, 9.

#### FALSE IMPRISONMENT.

*See* TRESPASS, 2.

#### FRAUDULENT PREFERENCE.

*See* BANKRUPT, 4.

#### FRIENDLY SOCIETIES.

By the rules of a friendly society, a medical attendant was entitled to 3s. *per annum* from every member; and a committee of the society were authorised to settle all disputes, grievances, &c., relative to the affairs of the society, subject to an appeal to two magistrates.

The plaintiff, who had been duly appointed medical attendant, was dismissed by the committee without any meeting of the members of the society at large, and another appointed. Upon an application to magistrates, they recommended a public meeting; which being convened accordingly, a large majority of the members voted for the plaintiff, who thereupon sued the defendant, the treasurer, for the 3s. received to the use of the medical attendant:

*Held*, that the plaintiff was entitled to recover, and that the defendant was not exonerated by an order of the committee not to pay. *Garner v. Shelley and Others.* 477

#### GROUND-RENT.

*See* LANDLORD AND TENANT, 2.

#### GUARANTY.

*See* ACTION ON THE CASE, 3.

Defendant guaranteed the payment of gold with which plaintiff should supply a goldsmith for the purposes of his trade. Plaintiff discounted bills for the goldsmith, and gave him for them partly gold, and partly money: the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills:

*Held*, that the defendant was not liable under his guarantee for the gold so furnished. *Evans v. Whyte.* 485

#### INSURANCE.

1. In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life insured, and the servant of the insurance-office undertakes to do all that is required by his office.

2. Plaintiff effecting an insurance on the life of H., with whom he was unacquainted, desired the agent of the insurance-office to do all that was requisite. The agent knew H. well, and made the usual inquiries. One of the terms of the contract was, a reference to the usual medical attendant of the life insured.

H. having given a false reference: *Held*, that the plaintiff could not recover. *Everett v. Desborough.* 503

#### JOINT STOCK COMPANY.

1. Debt on bond, conditioned for paying plaintiff 10,000*l.*, upon his forming a company, and procuring purchasers for 9000 shares therein; such company to carry on a distillery according to a process for which a patent had been granted.

Plea, that the patent contained a proviso, rendering it void if transferred to more than five; that it was intended the said company should consist of more than five, and be formed for the purpose of enjoying the benefit of the letters-patent, of acting as a corporate body, and of dividing the benefit of the patent into 10,000 shares, transferable and assignable without charter from the king; and that it was corruptly and illegally agreed between the parties, that the plaintiff should form the company for such purposes, and should sell the 9000 shares in order to raise a larger sum of money, under pretence of carrying on the privilege granted by the patent:

*Held*, a bar to the action. *Duvergier v. Fellows.* 248

2. The defendants had purchased the scrip of a mining company originated in fraud, and attended one meeting of the company; but they never signed the partnership-deed, were innocent of the fraud, and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after defendants had purchased their scrip:

*Held*, they were liable. *Ellis v. Schmark and Another.* 521

#### JUDGMENT.

*See* PRACTICE, 1, 10.

#### LANDLORD AND TENANT.

*See* DISTRESS, 1, 2. *ELZOTT*, 2.

1. Plaintiff, who had entered on premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him and his landlord:

*Held*, that this constituted him a tenant from year to year, and liable to distress. *Cox v. Bent and Others.* 185

2. 1. A payment of ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment, because the ground-landlord on demanding it allows the occupier time to pay.

2. *Growing* rent may be discharged by such payments as well as rent actually due.

3. Where growing rent has been reduced by payments of land-tax, &c., if the landlord distrains for the whole sum reserved, the tenant may properly sue in case. *Carter v. Carter and Others.* 406

3. A landlord having treated an occupier of his land as a trespasser, by serving him with an ejectment, cannot afterwards distrain on him for rent, although the ejectment is directed against the claim of a third person, who comes in and defends in lieu of the occupier, and the occupier is aware of that circumstance, and is never turned out of possession. *Bridges v. Smith.* 410

### LEASE.

He who lets, agrees to give possession, and if he fails to do so, the lessee may recover damages against him, and is not driven to bring an ejectment. *Coe v. Clay.* 440

### LIBEL.

1. It is a libel to publish of a protestant archbishop, that he attempts to convert Catholic priests by offers of money and preferment. *Archbishop of Tuam v. Robeson and Another.* 17
2. In an action for a libel, it is no plea, that the defendant had the libellous statement from another, and upon publication disclosed the author's name. *Sir W. De Crespigny v. Wallesley.* 392

### LIEN.

A party, who, having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises.

*Quare*, Whether a trainer of race-horses has a lien on the horses for his services in training? *Jacobs, Assignee of Lawton, a Bankrupt, v. Latour and Messer.* 130

### LIMITATIONS.

1. Where money, which under a power in a will was directed to be raised by the sale of an estate, and to be invested by trustees with the consent by deed of the party interested, was invested partly in 1783, without any such consent by deed, and partly in 1806, by the person interested himself, the trustees having become *non compos*, and an act of parliament, reciting these investments, appointed a new trustee, Held, that neither the act nor the lapse of time cured the defective execution of the power, as against a writ of *formedon*.

2. The issue was, whether the money had been invested with the consent of the *cestui que* trust, according to the directions of this will: Held, that it was correct to direct the jury to consider, whether it had been invested with the consent of the *ces-*

*tui que* trust manifested by deed. *Sholmeley v. Paxton and Others.* 48

### LONDON COURT OF CONSCIENCE ACT.

An officer of the sheriff of Middlesex, who resided and carried on his business in Middlesex, but who had also an office in London,

Held, "to seek his livelihood in London," within the meaning of the London court of conscience act. *Bushnell and Others v. Levi.* 315

### MALICIOUS INJURIES' ACT, CONSTRUCTION OF.

Defendant, as *senneee*, having the care of certain lands, over which the plaintiff was making a road, asked him by what authority he acted: the plaintiff said, by authority of the magistrates, but did not exhibit any warrant; whereupon the defendant apprehended and took him before a magistrate: Held, that defendant was entitled to notice of action under 7 & 8 G. 4, c. 30, although the plaintiff was not committing a malicious injury. *Wright v. Wales.* 336

### MEMORANDA.

Pages 298, 432.

### MONEY HAD AND RECEIVED.

See BANKRUPT, 2. DISTRESS, 3. POWER

### MORTGAGE.

1. Where the mortgagor remains in possession, and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on non-payment, may eject the mortgagor without notice to quit, or demand of possession. *Doe d. Fisher v. Giles and Others.* 421

2. 1. In taxing the costs upon a mortgage transaction, the mortgagee is not allowed the expense of a declaration of trust from him to a *cestui que* trust who lends the money.

2. The assignment of a mortgage must have an *ad valorem* stamp, if it be accompanied with any new security, or any additional sum be advanced. *Martin, Demandant; Baxter, Tenant; Grubb and Wife, Vouchers.* 160

### NOTICE TO QUIT.

See EJECT, 2. MORTGAGE, 1.

### PAVING ACT.

The metropolis paving act, 57 G. 3, c. 29, s. 136, has repealed the Clink liberty paving act, 52 G. 3, c. 14, as to the time of commencing actions. *Burns v. Carter and Others.* 429

### PAYMENT.

See BILL OF EXCHANGE.

### PAYING INTO COURT.

See PRACTICE, 6, 11.

PLEADING.

See ASSUMPSIT, 1. BYE-LAW, 2. JOINT STOCK COMPANY, 1. LANDLORD AND TENANT, 2, 3. LIBEL, 2.

1. In an action against the assignees of a bankrupt, the Court refused to permit defendants to plead *non est factum*, and that the premises did not come to them by assignment. *Whale v. Lenny and Others*. 12

2. If it appears on the whole that the condition of a bail-bond is to appear in the Common Pleas, it may be described as such in the declaration, although the expression on the bond is, "to appear before our lord the King at Westminster," instead of, "before the justices of our lord the King." *Crofts v. Stockley and Another*. 32

3. Variance. Evidence that according to the custom of the trade the plaintiffs delivered coals to N. H. daily, and that at the end of every month he gave a bill, payable in two months:

Held, not sufficient to charge defendant upon a guarantee for the payment of coals to be delivered to N. H. at a credit of two months from the delivery. *Holl and Another v. Hadley*. 54

4. Where the plaintiff's title to an advowson was traced in *quare impedit* through a period of two centuries, and the defendant's claim arose on the alleged invalidity of a deed of 1672, the Court would not allow him to traverse all the allegations in the declaration, or to plead more pleas than were necessary to contest the deed of 1672. *Gully and Others v. The Bishop of Exeter and Dowling*. 42

5. In a declaration on a bail-bound, it is not necessary to aver that the writ on which defendant was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to. *Sharpe, Assignee of the Sheriff of Middlesex, v. Abbey and Others*. 193

6. 1. Debt lies against an executrix upon a cause of action accruing after the death of the testator.

2. Where an executrix referred to arbitration, to be finally determined on, certain disputes and differences respecting certain unsettled accounts, and the arbitrators, without finding assets, awarded her to pay a certain sum: Held, that *plene administravit* was no bar to an action on the award. *Riddell v. Sutton, Executrix of Sutton*. 200

7. Declaration amended by allowing plaintiff to declare, on the same cause of action, as surviving partners instead of administratrixes. *Taylor and Others, Administratrixes of Forder v. Lyon*. 333

8 A plea false on the face of it may be treated as a nullity. *Vere and Others v. Carden*. 413

9. A defendant may plead matter *pursuam continuanee*, notwithstanding an order to rejoin issuably. *Bryant v. Sir J. Perriug*. 414

POST-MARK.

See EVIDENCE, 7.

POWER.

Defendants entered into an agreement with C. to carry on for them certain mining speculations in America, furnished him with instructions,—a letter authorizing him to draw on them for 10,000*l.*, and a power of attorney of the most extensive description, "to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might deem necessary for the purpose."

C., after he had raised 10,000*l.* under the letter of authority, obtained of plaintiff in America 1500*l.*, which he applied to the defendant's use, and for the amount drew bills on defendants, which he indorsed to plaintiff. He did not show the letter of authority to the plaintiff; there were no indorsements on it of sums previously raised, and it did not appear that the plaintiff knew that any money had been raised before by C.; the defendant refused to accept the bills:

Held, that the plaintiff was entitled to recover 1500*l.* from defendants, as money had and received to his use. *Withington v. Herring and Others*. 442

PRACTICE.

See PLEADING, 9.

1. Where a *recognovit* was given on the 8th of February in Hilary term, with a condition that judgment should not be entered, unless default should be made in payment on the ensuing 1st April, and the defendant died in Hilary vacation, before the 1st of April, judgment entered up on the 10th April in Hilary vacation, after defendant's death, was held regular, as relating to the first day of Hilary term, as also execution tested of a day in that term anterior to the defendant's death. *Calvert v. Tomlin*. 1

2. The Court will not discharge a defendant from custody under a *ca. sa.* on the ground that he has been before irregularly taken and discharged under criminal process at the instance of the plaintiff. *Mackie v. Warren*. 176

3. Where defendant, after an application by plaintiff's attorney, paid plaintiff the debt demanded, without notice that a writ had been sued out, about which the plaintiff said nothing, and the attorney afterwards arrested defendant for the costs on a writ which had been sued out before the payment of the debt, the Court stayed the proceedings without costs. *Rooke v. Wasp*. 190

4. In moving to set aside an award made under a rule of Court, the rule *missi* ought to be drawn up on reading the rule under which the matter was referred, and the objections to the award ought to be specified. *Christie v. Hamlet*. 195

5. The Court discharged a rule for changing the *venue*, on an affidavit that the defendant's attorney had said he should change the *venue* to postpone the trial, and (which was the fact) that in the interim an act would come into operation which would defeat the plaintiff's claim. *Gassler, J.*

- disassentient. Amner and Another v. Cat-tell.* 208
6. Money paid into Court under 7 & 8 G. 4, c. 71, to abide the event of a cause, is not paid out under a rule absolute in the first instance. *Symes v. Ross.* 269
7. The Court discourages the practice of ordering *nihil* to be returned as a *scire facias*. *Bedington v. Bedington.* 284
9. Affidavit, that the defendant had undertaken to be answerable to the creditors of J. and W. M. for the amount of the debts of such creditors, on their, the creditors, undertaking not to issue a commission of bankrupt against J. and W. M. before the 16th of August; that J. and W. M. owed plaintiffs 1000*l.*; that neither plaintiffs, nor, as they were informed and believed, any other of the creditors of J. and W. M. sued out a commission of bankrupt against J. and W. M. before the 16th of August; that neither J. and W. M. nor defendant paid plaintiffs the 1000*l.* due to them from J. and W. M.; and that defendant owed plaintiffs 1000*l.* upon his said undertaking;  
Held, insufficient to hold defendant to bail. *Elwothy and Others v. Maunder.* 295
9. Where a party to an arbitration under a rule of court revoked the arbitrators' authority upon discovering improper conduct and then having sued for, and recovered by action, damages for the matter in dispute, went to reside in Scotland, the Court refused to stay execution upon the application of the adverse party, who proposed thereby to compel him to appear to an action on the arbitration-bond, the arbitrator having awarded against him, notwithstanding the revocation of authority. *Steward v. Williamson.* 415
10. Judgment signed in a writ of right, because a blank was left for the word *expleas* in the count, set aside. *Webb, Demandant; Lane, Tenant.* 285
11. Payment of money into court upon a general *indebitatus assumpsit* is no admission of a contract beyond the amount of the sum paid in. *Seaton v. Benedict.* 28

#### PROMISSORY NOTE.

*See* STAMP.

#### RECOVERY.

Where one of the vouches became insane between the time of executing the warrent of attorney and the passing of the recovery, the Court refused to let it pass as to him, but permitted it as to the other parties. *Vale and Others, Vouchers.* 176

#### REPLEVIN.

*See* LANDLORD AND TENANT, 3.

#### RESCOUS.

Plaintiff distrained defendant's cattle damage-*seant*, and went to apprise defendant: during his absence the cattle escaped for half an hour into defendant's ground, whence plaintiff, on his return, drove

them to his own yard: defendant having taken them thence,  
Held, no rescue. *Knowles v. Blake and Thomas.* 499

#### SHAM PLEA.

*See* PLEADING, 8.

#### SCHOOLMASTER.

*See* ASSUMPSIT, 2.

#### SCL. FA.

*See* PRACTICE, 7.

#### SEA-WALLS.

*See* ACTION ON THE CASE.

#### SHIPPING.

It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the defendant. *Furnell v. Thomas.* 188

#### STAMP.

*See* MORTGAGE, 2, 2.

A note for 100*l.*, payable to A. B. or order on demand, is subject only to a stamp of 3*s.* 6*d.* *Armitage v. Barry and Another.*

#### STAYING PROCEEDINGS.

*See* PRACTICE, 3, 9.

#### TITHES.

Where commissioners under an inclosure act of 1789 were to make allotments to persons possessing interests in the contiguous townships A., B., and C., and made allotments to a rector in B. and C. in respect of tithes and glebe to which he was entitled in B. and C., and in A. in respect of glebe to which he was entitled in A., but omitted to make any specific allotment in A. in respect of tithes to which he was entitled in A.; the act containing a saving clause for all persons other than those to whom allotments or compensations should be made in respect of their several interests, Held, that the rector was not barred from suing for his tithes in A. in 1825, although the award was to be final unless appealed against in six months. *Thorpe v. Cooper.* 116

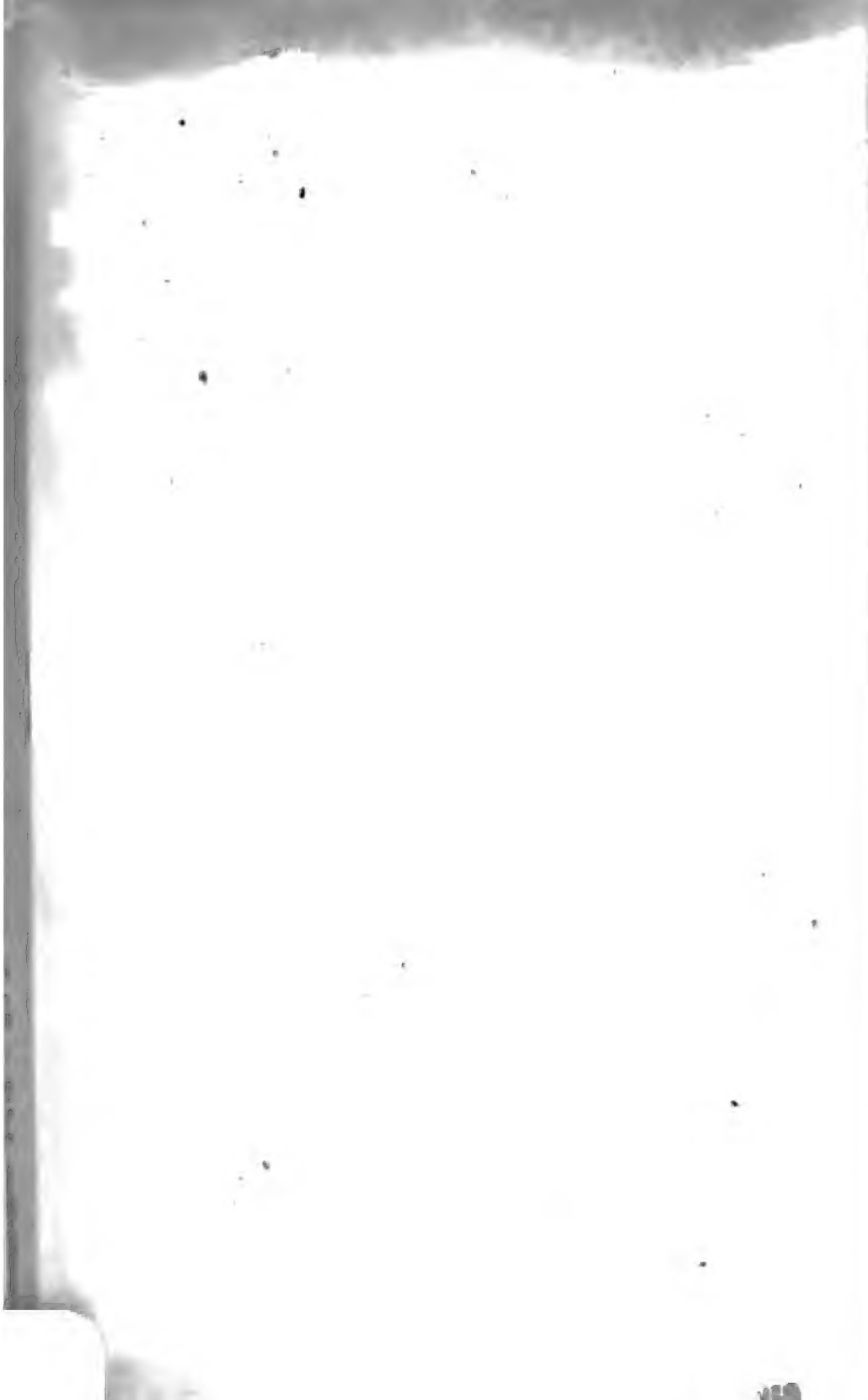
#### TOLL.

1. Keeping up a capstern and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, Held, a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstern or not; and the custom to exact the toll, held good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shown to have been such; but he and they had always been owners of the spot on which the capstern stood, and of an estate in the neighbourhood.









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